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Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

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F.C.C. 72-876

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Application of ACT CO., INC., ANDERSON, S.C. For a Certificate of Compliance Pursuant to Part 76, Subpart B of the Commission's Rules	CAC-607 (SC028)

MEMORANDUM OPINION AND ORDER

(Adopted October 5, 1972; Released October 13, 1972)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND REID ABSENT.

1. Act Company, Inc., operates a cable television system in Anderson, South Carolina presently carrying the following television signals, all of which are subject to required carriage under the rules:

WSPA-TV (CBS, Ch. 7), Spartanburg, South Carolina.
WFBC-TV (NBC, Ch. 4), Greenville, South Carolina.
WNTV (ETV, Ch. 29), Greenville, South Carolina.
WLOS-TV (ABC, Ch. 13), Asheville, North Carolina.
WUNF-TV (ETV, Ch. 33), Asheville, North Carolina.
WGTV (ETV, Ch. 8), Athens, Georgia.
WAIM-TV (ABC-CBS, Ch. 40), Anderson, South Carolina.

Act Company proposes to add to this system carriage of television stations:

WRET-TV (Ind., Ch. 36), Charlotte, North Carolina.
WTCG (Ind., Ch. 17), Atlanta, Georgia.[1]

In order to obtain authorization to add carriage of these signals, Act Company has filed an application for a Certificate of Compliance pursuant to Part 76, Subpart B of the Commission's Rules. Oppositions to the application have been filed by Multimedia, Inc., licensee of Television Station WFBC-TV (NBC, Ch. 4), Greenville, South Carolina and by Spartan Radiocasting Company, licensee of Television Station WSPA-TV (CBS, Ch. 7), Spartanburg, South Carolina.

2. Anderson, South Carolina is one of the designated communities in the Greenville-Spartanburg-Anderson, South Carolina-Asheville, North Carolina major television market (#46). The Act Company cable television system in Anderson is already in operation so that compliance with the franchise standards provisions of the Rules (Section 76.31) is not required until March 31, 1977, or the expiration of its existing franchise. Act Company's application indicates that it will have a twenty channel capacity, two-way capability, and program production facilities, and that it will provide the public, educational, government and leased access channels required by the Rules (Section

[1] Carriage of television station WRIP-TV, Chattanooga, Tennessee, was also initially proposed but it is no longer being sought at this time. See paragraph 3, *infra*.

109-012—72——1

76.251). Additionally, the carriage of two distant independent stations as requested is consistent with the signal carriage provisions of the Rules (Section 76.61(b)). The service proposed thus appears to be entirely consistent with the Rules.

3. Oppositions to the application raise two questions. First, Act Company had initially sought carriage of a third distant independent television signal (WRIP–TV (Ind., Ch. 61), Chattanooga, Tennessee). The oppositions pointed out that there was a station in the market[2] which, although not operational, had a construction permit that was less than 18 months old so that it had to be considered in ascertaining the number of signals that the rules permit to be carried. Act Company has acknowledged the correctness of this position and has accordingly not pressed its request for this third signal. It requests instead that its application, insofar as it involves this signal, be retained on file and available for grant if the market station is not on-the-air at the end of the 18 month period specified by Section 76.61(b). While we cannot agree that this is a proper manner to proceed insofar as the third signal is concerned, it appears that there is no dispute that carriage of the other two signals requested is consistent with the rules. To the extent that Act Company still desires carriage of a third signal, a new application at the appropriate time will be required. The second ground for opposition to grant of the application involved the program exclusivity provisions of Part 76, Subpart F of the Rules. Both Spartan Radiocasting Company and Multimedia, Inc., ask that a Certificate not be granted until Act Company has indicated in writing that it will provide the required program exclusivity protection. In response to these objections, Act Company has indicated that it will honor all proper requests for network and syndicated program exclusivity. It thus appears that the service proposed is consistent with the Rules and that the objections raised to the grant of the requested Certificate of Compliance have been satisfied.

Accordingly, IT IS ORDERED, That the captioned application for a Certificate of Compliance filed by Act Company, Inc., IS GRANTED to the extent reflected herein and is otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[2] WGGS–TV channel 16, Greenville, South Carolina.

F.C.C. 72-904

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re
AKRON TELERAMA, INC.
AKRON, TALLMADGE, STOW, CUYAHOGA FALLS, AND BARBERTON, OHIO
Request for Stay

ORDER

(Adopted October 10, 1972; Released October 11, 1972)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND REID ABSENT.

1. On September 18, 1972, the Commission released its Order in *Akron Telerama, Inc.*, FCC 72-827, ——FCC 2d——, in which it granted a "Request for Stay" filed by Scripps-Howard Broadcasting Company to the extent of requiring Akron Telerama to maintain the same alignment of stations to channels as existed September 5, 1972, on its above-captioned cable television systems. On October 9, 1972, Scripps-Howard advised the Commission that it has entered into an agreement with Akron Telerama; wishes to withdraw the pleadings it earlier filed; and would have no objection if the Commission rescinds its stay.

2. Since the controversy has been settled, there is no reason to keep the stay in effect.

Accordingly, IT IS ORDERED, That the stay ordered in FCC 72-827 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-895

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of INQUIRY INTO THE EXTENT TO WHICH AMATEUR STATIONS SHOULD BE USED ON BEHALF OF NONAMATEUR ORGANIZATIONS	Docket No. 19245 RM-1687

REPORT AND ORDER

(Adopted October 5, 1972; Released October 11, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONER REID ABSENT.

1. On April 28, 1971, the Commission issued a Notice of Inquiry in the above-entitled matter. The Notice which was published in the Federal Register on May 8, 1971, (36 F.R. 8611) requested that comments be filed by interested parties by July 1, 1971. Subsequently, the time for filing comments was extended to August 31, 1971. Seventy-five comments were filed by both individuals, amateur organizations, and other organizations which have in the past used the facilities of amateur radio stations.

2. The Notice of Inquiry was the proximate result of § 97.39 which prohibits certain organizations from both obtaining an amateur station license or having an amateur operator use his station on behalf of those organizations. One of the effects of this Rule is to prohibit amateur operators from using their stations on behalf of such parties as the Eye Bank, American Red Cross and the March of Dimes as well as commercial businesses.

3. Our Notice requested comments regarding whether any restriction on the use of amateur radio stations by non-amateur organizations is needed. We also requested comments on what those restrictions should be. The Notice further related to the fact that unlimited operation on behalf of organizations (third party communications) could lead to the creation of large numbers of new networks which would create additional unwarranted interference on the amateur bands.

4. The comments received in the Docket suggested many solutions to the problem of which organizations, if any, should be allowed to use amateur radio facilities. The comments covered the full range from no third party communications to any communications that individual amateurs wish to carry. Most of the comments advocated a position between those two positions. Three comments suggested that amateur radio be used on behalf of non-amateur organizations but only when normal communications are unavailable. Many other comments suggested that third party communications be allowed for charitable non-profit organizations but only during emergencies. A majority of the comments agreed that it is not a sound practice to allow commercial

organizations to use amateur radio stations but there was no consensus as to what other organization should have use of amateur stations.

5. The Commission believes that the best solution lies between the extremes of prohibiting entirely third party communication and permitting unlimited third party operations. To prohibit entirely third party traffic would tend to stifle one of the basic purposes of the Amateur Radio Service which is to provide a voluntary non-commercial radio service. But to allow all third party communications would tend to cause increased congestion in the Amateur bands. A basic principle permeating our rules and the international radio regulations is that amateur radio shall not be used for any pecuniary interest to any party or for commercial communications. The international rules specifically provide that amateur radiocommunications must be of a technical nature or remarks of a personal character for which, by reason of their unimportance, recourse to a public telecommunications service is not justified. There can be no legitimate reason for an amateur station to carry message traffic of a commercial nature. Radiocommunications, the sole purpose of which is to facilitate regular business or commercial activities, do not enhance the intended purpose of the Amateur Service and should not be allowed except for an emergency communication as defined in our rules.

6. Several comments were received which suggested that the thrust of the Commission's Notice of Inquiry was to censor the Amateur Radio Service. These comments suggested that any categorization of groups, some of which could use amateur radio facilities and others who could not, would be in violation of § 326 of the Communications Act of 1934 which prohibits censorship of radio communications. It has been established, however, that eligibility restrictions and reasonable rules limiting communications to those consistent with the purpose of the radio service involved are within the scope of the Commission's authority. See, *Lafayette Radio Electronics Corp. v. United States*, 345 F. 2d 278 (2nd Cir. 1965). Moreover, it is not only permissible but an affirmative duty of this Commission to classify radio stations and to regulate the nature of the radiocommunication service that is to be rendered by stations in that class. See § 303 (a) and (b). Our rules adopted today regarding commercial third party traffic merely regulate generally the nature of the radiocommunication service which may be rendered by amateur stations.

7. The Rules adopted today will delete the phrase "nor for its use" which is contained in § 97.39. The result of this action will make § 97.39 a rule concerned only with who or what organizations may obtain a license. The amended § 97.39 will not be directed to permissible communication nor to the use of an amateur station.

8. We are adding a new section, § 97.114, which will both prohibit commercial third party traffic and clarify the permissible international third party traffic. As to the provisions of subparagraph (a) concerning international third party traffic, these rules simply incorporate the already existing international rules. As such they make no change in permissible communications and they are therefore considered to be of an editorial nature. Subsection (c) of § 97.114 prohibits corporations, companies, associations and other organizations engaged in commercial activities from using amateur radio facilities. It will

not prohibit the use of the Amateur Radio Service on behalf of organizations such as the Eye Bank and the American Red Cross except for traffic which relates to the regular business affairs of those organizations. Subparagraph (b) will prohibit amateur control operators or station licensees from receiving any compensation including a salary or reimbursement for non-collect telephone calls for operating an amateur station for transmitting or delivering third party traffic. This provision explicitly sets forth the fact that both domestic and international amateur traffic must not be handled with a pecuniary interest in mind.

9. To prevent unnecessary confusion as to what is meant by third party traffic, we are adopting a definition of that term and are making editorial changes in § 97.79(d).

10. The provisions of § 97.114(b) and 97.112 will clearly prohibit the American Radio Relay League's long standing practice of providing compensation to the control operators of station W1AW. As a consequence, we are today issuing a Notice of Proposed Rule Making in a separate proceeding which would allow in certain instances involving club stations the compensation of control operators. We are also herein granting a waiver of the necessary rules to the licensee of station W1AW to allow the station to continue to operate pending the final action on our Notice of Proposed Rule Making. Any other club station providing similar services as W1AW may apply for a similar waiver. Such requests will be handled on a case by case basis.

11. The American Radio Relay League and several other individuals filed comments which suggested that the Commission adopt a rule specifically prohibiting communications for any purpose or activity which is contrary to federal, state, or local law. We find that this suggestion as it applies to any radio communications including third party traffic, has substantial merit. Therefore, with certain editorial changes, we are adopting their proposal as § 97.116.

12. Authority for the rule changes adopted herein is contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

13. The Commission finds that further Public Notice in regard to the subject matter of this Report and Order is unnecessary. Notice of the general subject matter and of the issues involved was previously given and extensive comments from interested parties have been received and given careful consideration. No public interest would be served by further notice and public participation in this matter.

14. IT IS ORDERED, effective December 1, 1972, that Part 97 of the Commission's Rules is amended as set forth in the attached Appendix.

15. IT IS FURTHER ORDERED, that a waiver of §§ 97.112 and 97.114(b) is GRANTED to the licensee of amateur station W1AW.

16. IT IS FURTHER ORDERED, that RM–1687 is denied to the extent that it is inconsistent with the rules adopted in this Report and Order and that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Part 97 of the Commission's Rules is amended as follows:

1. Section 97.3(w) and (x) is added as follows:

§ 97.3 *Definitions*

* * * * * * *

(w) *Third party traffic.* Amateur radiocommunication by or under the supervision of the control operator at an amateur radio station to another amateur radio station on behalf of any one other than the control operator.

(x) *Emergency communication.* Any amateur radio communication directly relating to the immediate safety of life of individuals or the immediate protection of property.

2. Section 97.39 is amended to read as follows:

§ 97.39 *Eligibility of corporations or organizations to hold station license.*

An amateur station license will not be issued to a school, company, corporation, association, or other organization, except that in the case of a bona fide amateur radio organization or society, a station license may be issued to a licensed amateur operator, other than the holder of a Novice Class license, as trustee for such society.

3. Section 97.79(d) is amended to read as follows:

§ 97.79 *Control operator requirements.*

* * * * * * *

(d) The licensee of an amateur radio station may permit any third party to participate in amateur radio communication from his station, provided that a control operator is present and continuously monitors and supervises the radiocommunication to insure compliance with the rules.

4. Section 97.114 is added to read as follows:

§ 97.114 *Third party traffic.*

The transmission or delivery of the following amateur radiocommunication is prohibited:

(a) International third party traffic except with countries which have assented thereto;

(b) Third party traffic involving material compensation, either tangible or intangible, direct or indirect, to a third party, a station licensee, a control operator, or any other person.

(c) Except for an emergency communication as defined in this Part, third party traffic consisting of business communications on behalf of any party. For the purpose of this section business communication shall mean any transmission or communication the purpose of which is to facilitate the regular business or commercial affairs of any party.

4. Section 97.116 is added as follows:

§ 97.116 *Amateur radiocommunication for unlawful purposes prohibited.*

The transmission of radiocommunication or messages by an amateur radio station for any purpose, or in connection with any activity, which is contrary to Federal, State, or local law is prohibited.

F.C.C. 72-896

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 97 TO ALLOW THE COMPENSATION IN CERTAIN INSTANCES OF CONTROL OPERATORS OF STATIONS OPERATING IN THE AMATEUR RADIO SERVICE AND MODIFICATION OF THE LOGGING REQUIREMENTS REGARDING THIRD PARTY COMMUNICATIONS	Docket No. 19605

NOTICE OF PROPOSED RULE MAKING

(Adopted October 5, 1972; Released October 11, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONER REID ABSENT.

1. In our Report and Order adopted today in Docket 19245 we established rules regarding the type of third party traffic that amateur licensees may properly handle including the compensation of control operators for transmitting such messages. The Commission hereby gives Notice of Proposed Rule Making concerning the collateral issues of compensation of amateur club station control operators and possible relaxation of the logging requirement for third party communications.

2. The American Radio Relay League operates an amateur station that is engaged in multiple address point to point communications. They broadcast bulletins, informational matter, and code practice of particular significance to amateur licensees. This type of communication is highly beneficial to both amateur operators and the Amateur Radio Service and should be encouraged.

3. The equipment used by these stations is in many instances as complex as a standard or FM broadcast station. As a result, it is impractical to operate these stations with volunteers, especially if the station operates for a substantial period each week.

4. The Commission is considering two different solutions. First, we are proposing specific rules which are designed to allow any bona fide amateur organization to operate a station and provide reasonable compensation to the control operator when the station transmits material solely related to the Amateur Radio Service. The rules, which will be designated as § 97.112(b), set forth specific criteria which a club station must meet in order to provide compensation to their operators. These criteria are designed to insure that stations compensating their operators are in fact engaged in providing a service to a significantly large segment of amateur licensees. Another solution would be to create a new class of amateur station which will be required, before they will be licensed, to make a showing similar to our proposed rules contained in the attached appendix. Comments are invited regarding these

two possible solutions and any other proposals regarding this type of operation.

5. Section 97.103(b)(3) requires that an amateur radio station log include a notation of third party messages sent or received, including names of all participants and a brief description of the message content. The Commission invites comments regarding the usefulness of this requirement and whether it should be modified or deleted.

6. Authority for the proposed rule changes contained herein is contained in §§ (4)(i) and 303 of the Communications Act of 1934, as amended.

7. Pursuant to applicable procedures set forth in Section 1.419 of the Commission's Rules, an original and 14 copies of all material requested by this proceeding should be submitted on or before December 20, 1972, and reply comments on or before January 3, 1973. All relevant material will be considered by the Commission. In reaching its decision in this proceeding, the Commission may also take into account other relevant data before it in addition to the specific data invited by this Notice. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

In Section 97.112, the present text is designated as paragraph (a) and a new paragraph (b) is added to read as follows:

§ 97.112 *No remuneration for use of station*

* * * * * * *

(b) Control operators of a Club Station may be compensated when the club station is operated primarily for the purpose of conducting amateur radiocommunication to provide code practice transmissions intended for persons learning or improving proficiency in the International Morse Code, or to disseminate information bulletins consisting solely of subject matter having direct interest to the Amateur Radio Service provided:

(1) The station is operated weekly for a period of at least 40 hours;

(2) The station schedules operations on all allocated high frequency amateur bands using reasonable measures to maximize coverage;

(3) The schedule of normal operating times and frequencies is published at least 30 days in advance of the actual transmissions;

F.C.C. 72-911

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
BRENTWOOD CO., BAKERSFIELD, CALIF.
Transmittal No. 4 to Tariff F.C.C. No. 1

MEMORANDUM OPINION AND ORDER

(Adopted October 12, 1972; Released October 16, 1972)

BY THE COMMISSION: COMMISSIONER BURCH, CHAIRMEN ROBERT E. LEE, JOHNSON, H. REX LEE, REID, WILEY AND HOOKS.

1. On August 1, 1972, the Brentwood Company, a microwave common carrier, filed certain revised pages to its Tariff F.C.C. No. 1 (T.L. No. 4), effective September 30, 1972 which, among other things, increased the rates for CATV Program Transmission service to Breckenridge Mountain and Lamont, California. However, in filing these tariff pages, Brentwood did not submit any cost or other data to the Commission in justification for these increases or state the reasons why they were being made.

2. On September 15, 1972, Bakersfield Cable TV, Inc., a CATV customer of Brentwood, filed a petition to suspend and set the increased rates for hearing. Petitioner stated that charges to it would increase from $300 to $500 a month, or 66⅔% with no different or improved service; that the cost and other data required by Section 61.38 of our rules were not submitted in support of the increase; and that the carrier is bound by a contract with petitioner not to increase its rates.

3. After this petition was filed Brentwood requested and was granted permission by the Commission to postpone the effective date of the rate increases until October 15, 1972 so that the carrier could respond to the merits of the petition and the Commission could have additional time to consider the carrier's response. On September 29, 1972 Brentwood filed its response claiming that, since the inception of service in 1966, Brentwood has lost $118,922; that during this period its rate of return was a negative 112.8%; that for the year 1971, its return was a negative 6.5% on investor-supplied capital; that the effect of the rate increase will be to increase Brentwood's rate of return to about 3.6%; that Brentwood's tariff revision supercedes any present contract it has with petitioner; that the $200.00 a month rate increase will not burden petitioner; that the increased rate is generally lower than the rate of other carriers for comparable service; and that Brentwood's total revenues from its common carrier microwave service was $6,900.00 in 1971 and that, accordingly, Brentwood was not required to submit cost data under Section 61.38 of our rules since this rule applies to carriers with $100,000 or more annual revenues.

4. In our opinion this petition stems from the failure or refusal on the part of Brentwood to accompany its August 1, 1972 tariff submission with any explanation whatsoever of the basis and reasons for the rate increases complained of or to provide any kind of explanation thereof to petitioner. Brentwood, relying on our rules that exempt small carriers of the size of Brentwood from submitting cost and other data to support rate increases, elected to provide no explanation at all. Thus, it was not until after petitioner filed its complaint that Brentwood, about two months after the tariff was filed, undertook to give any reason for the increases. We wish to emphasize that, although our tariff rules are designed to relieve small carriers of the burden of submitting detailed information in support of increased rates, we cannot condone the failure of such small carriers to submit sufficient information and data, at the time of filing rate increases, that will at least tend to show the reasonableness thereof. See 47 USC 201(b). Failure to do so in the future will subject the tariff to suspension or rejection.

5. However, we shall deny the petition in this particular case because Brentwood, in its belated submission, has provided sufficient data to indicate that a grant of petitioner's request for suspension and hearing would not be warranted at this time. In denying the petition we are not deciding that the rate increase is lawful. Thus, petitioner now has available to it the carrier's basis for the rate increases and it is free to pursue its claim of unlawfulness, by filing a complaint if it wishes to do so. If such complaint is properly supported and designated for hearing by us, the burden of proof will be upon the carrier to justify its rate increase. 47 USC 204.

6. In view of the foregoing, the petition IS DENIED without prejudice.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-866

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
CENTRAL STATES BROADCASTING, INC. For Renewal of Licenses of Stations KOIL and KOIL-FM, Omaha, Nebr.	File Nos. BR-516, BRH-992
GRACE BIBLE INSTITUTE, INC. For Renewal of License of Station KGBI-FM, Omaha, Nebr.	File No. BRH-1885
HERALD CORP. For Renewal of License of Station KETV-TV, Omaha, Nebr.	File No. BRCT-401
KFAB BROADCASTING CO. For Renewal of Licenses of Stations KFAB and KFAB-FM, Omaha, Nebr.	File Nos. BR-681, BRH-1152
MAY BROADCASTING CO. For Renewal of License of Station KMTV-TV, Omaha, Nebr.	File No. BRCT-67
MEREDITH CORP. For Renewal of Licenses of Stations WOW, KFMX-FM, and WOW-TV, Omaha, Nebr.	File Nos. BR-686, BRH-1210, BRCT-39
NEBRASKA EDUCATIONAL TELEVISION COMMISSION For Renewal of License of Station KYNE-TV, Omaha, Nebr.	File No. BRET-104
PAXTON RADIO, INC. For Renewal of License of Station KLNG, Omaha, Nebr.	File No. BR-1185
PIER SAN OF NEBRASKA, INC. For Renewal of License of Station KOOO, Omaha, Nebr.	File No. BR-3530

MEMORANDUM OPINION AND ORDER

(Adopted September 27, 1972; Released October 6, 1972)

BY THE COMMISSION: COMMISSIONER HOOKS DISSENTING AND ISSUING A STATEMENT IN WHICH COMMISSIONER JOHNSON JOINS.

1. The Commission has before it for consideration: (a) the above-captioned applications for renewal of the licenses of stations KETV-TV, KFAB-AM-FM, KGBI-FM, KLNG, KMTV-TV, KOIL-AM-FM, KOOO, KYNE-TV, WOW-AM, KFMX-FM, and WOW-TV, Omaha, Nebraska; (b) a petition to deny these applications, filed on May 3, 1971, by the Black Identity Education Association (hereinafter

BIEA), of Omaha, Nebraska; (c) pleadings in opposition and reply thereto.[1]

BACKGROUND

2. It is first noted, by way of background, that BIEA filed a petition to deny the above renewal applications on March 22, 1971. In this petition broad allegations were directed against each of the stations charging discrimination in employment practices and failure to program for the black community. With few exceptions the allegations against each station were identical in both form and wording. The petitioner failed to give any extrinsic evidence indicating racial discrimination on the part of any of the Omaha stations.[2] The allegations concerning programming were deficient in that they were framed as broad conclusory statements, unsupported by factual data. Thus, on April 9, 1971, the Commission directed a letter to Mrs. Aleane Carter, President of BIEA, setting forth the deficiencies found in the petition. This communication set out in detail the factual information. required in a formal petition to deny. Pertinent sections of the Commission's rules regarding petitions to deny were also forwarded to Mrs. Carter. Thereafter, on May 3, 1971, BIEA filed the pleadings now under consideration.

STANDING

3. As a threshold matter, some question is raised regarding the petitioner's standing as a party in interest. The pleadings do not set out the composition of the association, its purpose or any organizational details, other than a general statement that it is composed of members of minorities residing in Omaha. All Commission contact with BIEA and, with a few exceptions, apparently all contact on the part of the licensees with BIEA, has been through Mrs. Carter, the group's president. The question of standing is raised explicitly by Herald Corp., licensee of station KETV–TV. According to the licensee, the petitioner has not shown that it acts as the spokesman for "any representative groups having significant roots in the listening community," citing *Office of Communications of United Church of Christ* v. *FCC*, 359 F. 2d 994 (D.C. Cir. 1966). Petitioner's standing is also questioned by the licensee of station KLNG. The licensee points out that the petitioner has given no specific information concerning the make-up of the group represented and, therefore, it is impossible to determine whether the petitioner qualifies as a party in interest.

4. In reply to KETV–TV, petitioner states that the group is made up of black educators and ministers. Petitioner, however, for security purposes, refuses to give the names of members or the number of people in the group. Petitioner does not elaborate as to why it feels these security measures are necessary.

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[1] Central States Broadcasting Co., licensee of KOIL–AM–FM, is presently involved in a hearing and, therefore, has not filed opposition pleadings in this matter.

[2] The only specific allegation in regard to discriminatory employment practices concerned Juanito Rodriquez, a black, who, the petitioners state, applied for a position at each of the stations under consideration here, but was not hired by any of them. The pleadings did not specify the dates of Mr. Rodriquez's applications, and gave no further details to support this allegation.

5. It has long been held that members of the public in the community of license have standing to contest a licensee's renewal application. *Office of Communications of United Church of Christ* v. *FCC*, 359 F. 2d 994 (D.C. Cir. 1966). More recent Commission rulings aimed at this question make clear that standing will not be denied if the petitioner represents members of the listening and viewing audience of the licensee. See *Hale* v. *FCC*, 425 F. 2d 556 (D.C. Cir. 1970). Although more detail on the composition of the group is desirable, presumably Mrs. Carter and other members of BIEA are residents of Omaha, Nebraska, and qualify as members of the listening and viewing audience of the stations in question. We find, therefore, the BIEA has standing as a party in interest.

STATEMENT OF FACTS

6. According to the 1970 U.S. Census, Omaha, Nebraska, the city of license, has 34,431 black residents. This represents 9.9 per cent of the total population of Omaha. Less than one per cent of the population is made up of various other minority groups. Douglas County, in which Omaha is located, claims 8.5 per cent of its population as black with other minority groups making up 0.9 per cent.

7. Petitioner makes identical allegations against each licensee. Briefly stated, petitioner charges that the stations in question have participated in discriminatory hiring practices by employing few members of minority groups. BIEA also raises the question of programming, stating that each of the stations "reserve little or no space for locally-produced programming geared to meeting the needs and interests of the minority group peoples in contrast to the time reserved for local white programming." Although the petitioner makes the same general allegations against each licensee, the pleadings contain a myriad of elements relating to the various stations. For the purpose of clarity, a discussion of each allegation as it relates to the individual licensee is set out in detail below.

8. *KGBI–FM*. Petitioner first alleges that Grace Bible Institute, Inc., licensee of KGBI–FM, practices a policy of discriminatory hiring. This is substantiated, BIEA states, by the fact that KGBI–FM does not now have, and has never had, any blacks employed at the station. Petitioner also avers that the station has failed to program with an eye directed to the needs of minority groups. To substantiate this claim, petitioner alleges that KGBI–FM has only one album in its music library performed by a black and that the station devotes no air time to regular minority programming.

9. In opposition, the licensee denies that it has discriminated against blacks in its employment practices. Moreover, the licensee notes that KGBI–FM has only three full-time employees and, hence, is not required to file an equal employment opportunity program in accordance with the guidelines set forth in Section VI of the Commission's application form. In regard to the allegations concerning programming, the licensee states that its past programming has included blacks, citing as an example its weekly 15-minute public affairs program "Chat Time," which has, on occasion, featured blacks. The licensee also states that, beginning July 4, 1971, it will be broadcasting a weekly one-half

hour program featuring a black evangelist. Station KGBI–FM also denies the allegation that it has only one album by a black artist stating: "Our collection contains a few more than that, and they are used regularly." The licensee further states that musical selections are chosen not on the basis of the race of the performer, but on the basis of conformance to the station's format of sacred and classical music.

In reply, petitioner reaffirms its allegations regarding KGBI–FM's discriminatory hiring practices. The petitioner states, in response to the licensee's statement that it has never had a black applicant, that Juanito Rodriquez, a black minister, has applied for a position at the station many times. However, no specific dates or any other details of Mr. Rodriquez' experiences with the station are set out. The reply then goes on to admonish the licensee severely for misrepresenting itself when it, as a church-oriented station, should serve as an example for all other Omaha stations. Petitioner also reaffirms its allegation regarding inadequate black programming, stating that the examples given by the licensee represent only "token" efforts. Concerning its allegation that station KGBI–FM has only one album by a black artist in its collection, petitioner states that this was determined after speaking with a member of the station's staff and by a search through the music library by BIEA members. Petitioner, however, readily acknowledges the possibility that the station may have obtained other albums by blacks subsequent to their search.

10. *KFAB–AM–FM.* To substantiate its allegations in regard to discriminatory employment practices, petitioner notes that stations KFAB–AM and FM, at the time the present pleading was filed, had an employment force of 33 people with two of the staff members being black. As an exhibit to the petition, BIEA attached a portion of Section VI of the licensee's renewal application, which describes the station's efforts to recruit minorities. BIEA notes that the licensee states in Section VI that the station experiences a low employee turnover, and: "When vacancies have occurred in the past, we have contacted schools and other employment sources. Minority people with the necessary qualifications have not been available." Following this statement is the handwritten parenthetical comment by the petitioner, "This is a *lie*." The segment of the petition to deny dealing with programming [3] consists of portions of Section IV of the licensee's renewal application and a discussion by the petitioner of a number of songs written and recorded by blacks which apparently have not been played on KFAB. The caption to this discussion indicates that it applies with equal force to KOIL–AM–FM, KLNG, WOW, KOOO, and KFAB. The petitioner describes in detail a number of songs which hold special messages for blacks and include the lyrics from one such song.

11. In opposition, the licensee denies the allegations made against it by BIEA. The licensee states that the percentage of blacks on the station's staff (seven per cent) exceeds the percentage of blacks in its service area (four per cent), which includes not only the metropolitan Omaha area, but much of eastern Nebraska and western Iowa. The licensee also states that, because of the difficulty it has experienced

[3] Although the petition to deny is directed against both KFAB and KFAB–FM, it does not specifically mention the KFAB–FM program service.

in recruiting qualified minority employees, it has initiated a training program specifically for minorities which has produced one black newsman who is now employed at the station. The licensee also states that it is presently working to train another minority member. According to the licensee, station KFAB is also participating in Operation DRUM to prepare minority people for jobs in the broadcasting industry. With respect to the petitioner's allegations regarding the station's program service, the licensee notes that one-quarter of its broadcast service is devoted to news, weather, public affairs, agriculture and other related programming, exclusive of entertainment and sports. The licensee claims that this type of programming is aimed at minority needs as well as those of the white community. KFAB's entertainment programming, according to the licensee, is made up of "middle-of-the-road" music, geared for the widest general appeal. The licensee also notes that two Omaha stations, KOWH and KOWH–FM, program exclusively to meet the needs and interests of black listeners.

12. In reply, petitioner states that the licensee's program to train a minority person for a place on the KFAB staff represents only "token" efforts on the part of the station. The petitioner again repeats its allegation that the type of music played on KFAB is devoid of any black-composed or performed works. Incorporated with petitioner's reply is a letter from Walt Kavanagh, News and Public Affairs Manager of KFAB, to the Rev. James D. Hendrickson of the Omaha Human Relations Board. The letter is dated December 22, 1970, and deals with the station's efforts to serve the minority community. Attached to the letter are comments by BIEA criticizing the licensee's efforts described in the letter. For example, the petitioner alleges that the licensee has not actively searched out qualified blacks by sending recruiters into black neighborhoods or to places in the community where blacks normally congregate. Petitioner also asserts that the licensee has not made any effort to search out and hire qualified blacks from other areas of the country. BIEA again refers to Juanito Rodriquez, who apparently applied for a position with the station but was not hired. Finally, the Kavanagh letter refers to a weekly series entitled "Minority America" broadcast on KFAB. The petitioner is critical of this program, stating that it is broadcast at an early hour, 8:05 on Sundays, and runs only 25 minutes.

13. *KOOO.* The portion of the petition dealing with station KOOO again concerns the station's employment practices and minority programming. The pleadings, dealing with discriminatory hiring practices, consist of an assertion that the station's staff is made up of eight persons, one being an American Indian. To substantiate its allegation regarding programming, petitioner encloses a copy of portions of the licensee's renewal application. Appended to a description of KOOO's program "The Polish Hour" are the handwritten comments: "This is a need for soul music for black people," and "People of African descent, commonly called 'Negroes' have no such recognition for their needs and interests to be met along this *same* line." The petition also contains a page describing two black religious series which had been carried by the station in the past with the handwritten note that these programs were paid for by minorities. The petitioner concludes with the parenthetical statement that, on April 22, 1971, Mrs. Carter went

to the station to review the license files, but was told that the station manager was out and that the secretary did not know where the files were kept.

14. In opposition, the licensee primarily questions the quality of the pleadings, stating that the petitioner's allegations are cast in terms too broad and general to raise any substantial and material questions of fact. The licensee points out that the petitioner's own pleadings show that the station has minority staff members. The licensee also points out that KOOO has implemented an equal employment policy. The licensee finds it significant that BIEA fails to mention the black-oriented KOWH–AM–FM stations in its allegations regarding insufficient black programming. The licensee claims that the existence of these stations in Omaha negates any claim by petitioner concerning the absence of black programming in the community. The licensee also includes a report on the incident referred to by the petitioner concerning the unavailability of the station's license file for public inspection. The licensee states that Mrs. Carter came to the station over the noon hour, that the general manager was away from the office, and that his secretary did not know what portion of the file was open to the public. The licensee states further that, upon returning to the station and learning of this incident, the general manager contacted Mrs. Carter and sent her copies of the portion of the renewal file which she had been seeking. The licensee also states that, subsequent to this incident, pertinent members of the staff have been instructed as to the location of the public file.

15. In reply, BIEA reiterates its original allegations, stating that the KOOO staff has only "token" minority representation. Petitioner states that the licensee's reference to KOWH and KOWH–FM is not germane, since blacks should be able to find programs suited to their tastes on any station. BIEA expands this point by saying that many blacks do not listen to KOWH and suggest the possibility that many blacks may own faulty or worn-out radios that cannot receive all stations clearly. If KOWH is one of these stations which some blacks cannot receive, then, the petitioner alleges, these people must now be satisfied with the white programming on KOOO and the other stations in Omaha.

16. *KLNG.* The thrust of the petitioner's complaint against KLNG as it relates to discriminatory employment practices, is that the station employs only three blacks out of a total employment force of 21 people. As exhibits to its pleadings, BIEA submits several parts of the licensee's renewal application, namely: Exhibit 11 of Section IV–A, which consists of a numerical compilation of the employees by job description; Exhibit 14 to section VI, which describes the efforts made by KLNG to recruit qualified blacks; and Exhibit 8 of Section IV–A, captioned "Typical Programs Serving Public Needs." Petitioner further alleges that the music played on KLNG is devoid of works composed or performed by black artists. Finally, BIEA claims that KLNG broadcasts a weekly program by the Faith Temple Church, a black church in Omaha; that the station charges $100.00 for this broadcast; that this program should be considered a public affairs program, and that the church should not be made to pay for the broadcast.

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17. In response to these allegations, the licensee, Paxton Radio, Inc., states that petitioner has failed to establish any facts indicating that the operation of KLNG has been inconsistent with the public interest. The licensee states that, since acquiring control of KLNG on April 1, 1970, it has hired three blacks, placing two in executive positions. The licensee also notes the program format of KLNG consists of news and information programming from 6 a.m. to 8 p.m., and music during the evening hours. The licensee asserts that its program service is not directed to any particular group but, rather, is designed to appeal to the listening audience in general. The licensee states that it keeps no list of music played segregating performers by race, and that the station does not follow a practice of discrimination directed toward black artists. The licensee concedes that it does broadcast the services of the black Faith Temple Church and that it charges $100.00 for this broadcast. The licensee asserts, however, that this does not indicate discrimination in any way.

18. In reply, the petitioner reemphasizes the station's alleged lack of musical programming for blacks by claiming "The white man continues to insist that 'his' music is the only 'good' music around * * *" and that "By listening to their station, BIEA can state that any black music is played sole[ly] on a 'token' basis." With regard to the services broadcast from Faith Temple Church, the petitioner suggests that the station, in charging the church $100.00 per week, is attempting to force the program off the air or is trying "to plainly 'take advantage' of their zeal and determination to broadcast a weekly religious program." Finally, petitioner includes an article from the April 22, 1971, issue of *Jet Magazine* discussing the dissatisfaction of blacks with the way the broadcasting industry relates to them in its programming.

19. *WOW–AM, KFMX–FM and WOW–TV.* BIEA alleges that the licensee of WOW–AM and TV and KFMX–FM [4] is in violation of the Commission's rules with regard to equal employment practices, in that the stations have an employment force of 109 people, out of which only nine employees are black. Of these nine black employees, five are employed on a full-time basis, with the remaining four people serving as part-time employees. As part of its petition, the petitioner also includes a letter written on April 13, 1971, by the licensee to the Commission in response to the earlier petition to deny filed by BIEA. Next to a statement by the licensee stating that the WOW stations became the first broadcasters in the Omaha area to hire a black in the early 1960's is the handwritten interjection, "tokenism." Petitioner also alleges that the licensee has failed to program to meet the needs and interests of the minority community. Petitioner claims that only one hour a month is devoted to black programming. To substantiate this allegation, petitioner submits portions of Section IV–B of the WOW–TV renewal application which, contains descriptions of past programs. Written next to a description of a program entitled "Omaha, Can We Do?" is the comment, "Only black program;" next to the program "Farm Family of the Week," is the comment, "all white;" next to the program "Easter Services" is the comment, "white only;" next to the program "Romper Room" is the comment, "All white teachers, for

[4] Subsequent to the filing of the petition to deny, WOW–FM changed its call letters to KFMX–FM.

white kids participations only in past, few black now;" and, finally, next to the program "Martha's Kitchen" is the comment, "white folks cooking—no soul food or low income recipes or few."

19. The licensee, Meredith Corp., denies each allegation raised by the petitioner. In essence, the licensee challenges the quality of the evidence used to support the BIEA allegations, emphasizing that that portion of the petition which relates to the WOW stations is, for the most part, pages from the licensee's renewal application with handwritten statements in the margins.

20. In its reply to the licensee's opposition pleading, the petitioner again maintains that the licensee has made only "token" efforts in both employment and program service related to blacks. To further substantiate the allegation that the WOW stations discriminate in employment practices, the petitioner refers to a situation involving Mrs. Katherine Archie who was apparently, until recently, an employee of KFMX–FM. According to the petitioner, "She was first hired to pad the FCC report on minority employment. Secondly, she was given wrong instructions as how to operate on her job and was accused by the 'boss' as doing her job 'wrong.' When she stood up for her rights she was told that her services henceforth were to be terminated." The petitioner has attached Mrs. Archie's letter of resignation in which she accuses the station of discrimination in its treatment of her. Meredith Corp., in response to petitioner's allegation regarding the situation involving Mrs. Archie, avers that it made every effort to adequately train her. Licensee concedes that upon one occasion she was given incorrect instructions, but was informed shortly thereafter of the correct procedure. In conclusion, licensee states that the only reason Mrs. Archie was asked to resign was that she was unable to adequately perform the duties assigned to her.

21. *KMTV.* Petitioner charges the licensee, May Broadcasting Company, with discriminatory employment practices and cites the company's employment statistics to substantiate this point. According to the BIEA, the station has an employment force of 95 people with three full-time and eight black part-time employees. The petitioner submits a portion of the licensee's FCC Form 395 to verify these statistics. Petitioner further charges that four of the part-time black employees are used solely on KMTV's monthly 30-minute program, "Black on Black," dealing with problems in the black community. The petitioner also alleges that the licensee has failed to meet the needs of Omaha's minority community, in that only one-half hour a month is devoted to regular minority programming. Petitioner states that other programs, specifically the program "Hiring Line" which is hosted by a black, are only of general interest to the black community.

22. With regard to the petitioner's allegations concerning discriminatory employment practices, licensee points out that the employment statistics cited do not support this conclusion. The licensee states that blacks comprise 11 per cent of the KMTV staffers, while blacks make up less than four per cent of the population within the station's market area, as defined by the American Research Bureau. The licensee also points to its efforts to train minority members for broadcast employment, which are outlined in detail in its renewal application. These efforts include participation in Operation DRUM, working with the

Omaha Junior Achievement program to interest high school students in the industry and the initiation of a training program at Boys' Town, Nebraska, specifically aimed at minority students. Addressing itself to the petitioner's allegation of inadequate program service for minorities, the licensee again emphasizes that blacks comprise a tiny portion of the station's service area. The licensee defends the program "Hiring Line," which is criticized in the petition as not specifically pertaining to blacks. According to the licensee, unemployment is a problem in Omaha, especially in the black community, and "Hiring Line" is designed to deal with the unemployment problem, both as it affects blacks and the rest of the Omaha citizenry. In reply to the licensee's opposition, the petitioner merely reiterates the allegations made in the previous pleadings.

23. *KETV–TV.* The petitioner alleges that the employment practices of KETV–TV are discriminatory, and to substantiate this allegation points out that the station employs 69 people, out of which seven full-time employees and two part-time employees are black. As a part of its petition, petitioner includes Exhibit 17 of Section IV–B of the licensee's renewal application, which gives a numerical break-down of the employees by job description. Also included is Exhibit 17 to Section IV–B, which sets out the management of Station KETV–TV. The petitioner then goes on to allege that the licensee has ignored the needs of the minority community in that only one and one-half hours a week is devoted to regularly scheduled minority programming. Included with the pleadings are descriptions of a number of programs broadcast on KETV–TV, some of which dealt with minority problems and some of which did not. The petitioner is especially critical of the KETV–TV program, "Tell Me, Mr. Preacher," which is hosted by a white minister. According to the BIEA, this program is valueless to blacks, because a white minister cannot relate to the problems facing a black person. The petitioner further objects to the weekly broadcast of the services at Kountze Lutheran Church. According to the petitioner, very few of the minority people in Omaha are Lutheran, and the music sung by the church choir is not "soul music." Nor does the petitioner feel that the American Indian is adequately served by the programming of KETV–TV. The petitioner states that the station directs none of its programming to the problems of the Indian, except for an occasional news item. The petitioner further alleges that the station manifested its disinterest in serving the black community by refusing to hire Mrs. Carter as the hostess of a program now being aired on KETV–TV. The pleadings indicate that Mrs. Carter submitted a program suggestion to the station. This program was to consist of an hour of gospel music performed by the choirs of various black churches in the area and would have featured Mrs. Carter as the hostess. The pleadings state that, although KETV–TV used this suggested format, the station changed the name of the show and utilized a person already in the employ of the station as the host. According to Mrs. Carter, "they took my idea, my show, gave it another name * * *. They did not apparently want a black person to become a warm television personality." The petitioner also criticizes the quality of the program, stating that the station has refused to provide an organ to accompany the choirs. Finally, the petitioner refers to Operation DRUM, claiming that this program was or-

ganized quite recently and "just in time to report that the stations are trying to give the impression to the FCC that they had all along been interested in helping the young minority members."

24. The licensee, Herald Corp., denies that it has discriminated in its hiring practices and that it has failed to program for Omaha's blacks. The licensee finds it significant that the petitioner has included some parts of the licensee's renewal application, but has excluded other relevant portions; e.g., licensee's Section VI submission. The licensee also states that the petitioner has not given a complete picture of KETV–TV's efforts in the area of minority programming. The licensee states that the program descriptions included by the petitioner does not include the station's weekly series entitled "Rap About It," which deals directly with the problems currently facing minority groups in the city. The pleading then goes on to list other programs discussed in the renewal application which the licensee states are of direct interest to minority groups. In discussing the allegation regarding lack of Indian programming, the licensee points out that the petition to deny contains a description of a program carried by the station on the problems of the Omaha Indians. To further evidence its awareness of minority needs, the licensee states that a portion of the KETV–TV evening newscast is focused on minority issues. Turning to the petitioner's criticisms of the "Tell Me, Mr. Preacher" program and the Kountze Lutheran Church broadcasts, the licensee states that a number of ministers representing minority congregations have appeared on various programs, notably the "Filled With Soul" series. The licensee contests the validity of the BIEA allegation that the station appropriated Mrs. Carter's program idea. The program in question is entitled "Filled With Soul" and the licensee asserts that it is patterned after similar programs in other parts of the country. According to the licensee, Mrs. Carter has been involved in approximately eight of these programs. Licensee also states that a member of the station's staff, rather than Mrs. Carter, was made host of this show because of budgetary considerations and not out any desire an the licensee's part to restrain Mrs. Carter's television career. Finally, the licensee states that offers have been extended to the petitioners to discuss their grievances, but that these offers have not been accepted.

25. In their reply, the petitioner simply repeats its original allegations, and contends that the licensee has not rebutted any of the charges made against it. The petitioner also states that KETV–TV's two black newsmen have now left the station and, therefore, the station has ceased its daily presentation of minority news. According to the petitioner, the director of a program to train minorities in the broadcasting industry, located in New York City, contacted KETV–TV with information on qualified trainees, but the station refused to act on this information.

26. *KYNE–TV.* Station KYNE–TV is a non-commercial, educational television station and is licensed to the Nebraska Educational Television Commission (hereinafter NETC). The petitioner charges the licensee with discriminatory employment practices, and goes on to point out that the station employs one black teacher on a full-time basis and one on a part-time basis. This is the only evidence given to support the petitioner's contention. BIEA further alleges that the class sched-

ule presented by the station is devoid of programs with which black students can relate. To substantiate this allegation, the petitioner cites as an example the fifth grade level social studies program entitled "Americans All." The petitioner claims that the lesson materials for this 31-program series show that only one program dealt with a black man. This program featured Ralph Bunche. Petitioner concludes by submitting the 1970–71 program schedule to show that none of the programming on station KYNE–TV is relevant to black students.

27. The licensee denies that it engages in discriminatory employment practices stating that, at the present time, Station KYNE–TV has one black and one person of another minority group in its employ. The licensee also states that it has been working with Operation DRUM to train minority people. With regard to the BIEA allegations concerning inadequate programming, the licensee sets out in detail the processes through which programming is determined. The Metropolitan Omaha Educational Broadcasting Association, Inc. (MOEBA) Program Council is the programming arm of NETC, the licensee. The Department of Instruction of the Omaha School District works with MOEBA in planning the curriculum. The assistant director of curriculum of the Department of Instruction is a black as are others of the staff involved in the curriculum planning. The opposition pleadings describe in detail programs aimed to meet the needs and interests of minority students. Included in the programs cited is an eight lesson series entitled "The History of the Negro People," a ten lesson series on black literature entitled "Dark Reflections," and four lessons on black music in the "Living with Music" series. The licensee also describes a series of programs entitled "Cultural Understandings," which includes 16 lessons dealing with black, Indian, Oriental and Spanish Americans. The pleadings go on to list a number of special programs dealing with black problems. To further illustrate its awareness of minority needs, the licensee states that the KYNE–TV staff worked with a student group, Black Liberators for Action on Campus, on a 15-minute program promoting Black Heritage Week at the University of Nebraska.

28. In reply, the petitioner doubts the relevancy of the licensee's discussion of the make-up of the MOEBA and Department of Instruction staffs. The petitioner also points out that the programs listed as being of special interest to minorities are all "special" programs of limited duration. According to the petitioner, the station has no regularly scheduled year-round program service for blacks and other minorities. The petitioner goes on to state that special programs dealing with black heritage are not taught by blacks and are unable to instill in black students a sense of ethnic pride. Finally, the petitioner attaches to the pleadings a letter written by the licensee to the Omaha Human Relations Department, which discusses NETC's interest in hiring minority employees. Appended to this letter is a comment by BIEA stating that station KYNE–TV has an opening for a station manager. The petitioner claims that they have given the station information on qualified minority persons to fill this position, but apparently the station has not sought them out.

CONCLUSIONS

29. The recitation of facts set forth above does not purport to include every detail set out in these very voluminous pleadings. However, it is felt that the foregoing does accurately describe the petitioner's allegations and the nature of the respective licensees' opposition pleadings.

30. Petitioner charges each of the stations made the subject of the instant petition to deny with discriminatory employment practices. In so doing, petitioner relies almost exclusively upon statistical data by comparing the number of minority persons employed with the station's total workforce. Simply indicating the number of minority persons employed, without citing specific instances of discrimination or a conscious policy of exclusion, is not sufficient under Section 309(d)(1) of the Communications Act of 1934, as amended (47 U.S.C. 309(d)(1)), to require an evidentiary hearing. *Universal Communications Corp.*, 27 FCC 2d 1022 (1971); *The Evening Star Broadcasting (WMAL)*, 27 FCC 2d 316 (1971), affirmed *sub nom. Chuck Stone* v. *Federal Communications Commission*, Case No. 71-1166, D.C. Cir., June 30, 1972, *rehearing denied* September 1, 1972. We also note that most of the stations [5] made the subject of the instant petition have employees drawn from the minority community. We have at no time indicated that fully proportional employment of minority groups is called for by our rules, since we do not believe that fair employment practices will necessarily result in the employment of any minority group in direct proportion to its number in the community, *Nondiscrimination in Employment Practices of Broadcast Licensees*, 23 FCC 2d 430 (1970). Nevertheless we note that the racial composition of the staffs of several of the stations herein clearly fall within a range of reasonableness when compared to the percentage of minorities within their service areas, *cf. Chuck Stone* v. *Federal Communications Commission, supra*.[6] Further, several of these minority employees, as well as a number of women employed by the stations, occupy high paid positions—i.e., are in positions other than those generally classified as menial. Also, each of the stations, with the exception of KGBI-FM which because of its staff size is not required to do so, has developed an equal employment opportunity program designed to assure equal opportunities to all persons in the employment policies and practices. We have reviewed each of these programs and conclude that they do not contain barriers to equal employment opportunity and petitioners have failed to show that the licensees are exercising bad faith in the implementation of their programs.

31. Concerning Mr. Rodriquez's attempt to obtain employment at a number of the stations made the subject of the instant petition, we do not believe that merely applying for a job at a number of stations is sufficient to raise a substantial and material question of fact warranting exploration in an evidentiary hearing. Petitioners have not submitted

[5] Station KGBI-FM only has three employees, none of whom are minorities. Station KYNE-TV has no employees since it is operated by remote control from Channel 12 in Lincoln, Nebraska, licensed to the Board of Regents of the University of Nebraska.

[6] While no employer's status can be judged alone by the percentage of minorities and women employed, as noted by the court in *Chuck Stone* v. *Federal Communications Commission, supra*, an extremely low rate of such employees may raise question requiring appropriate administrative action. See *Report and Order* re: *Nondiscrimination in Employment Practices of Broadcast Licensees*, 23 FCC 2d 430, 431 (1970).

any facts which would at least indicate that positions were available at any of the stations. Nor do the situations involving Mrs. Archie and Mrs. Carter indicate discriminatory employment practices. With reference to Mrs. Archie, we take note of the licensee's letter of July 1, 1971, explaining the efforts undertaken to train and qualify her and her subsequent employment termination. Mrs. Archie was given a written evaluation of her performance and, apparently, in preference to accepting the evaluation, requested permission to dictate a letter of resignation. The efforts undertaken to train Mrs. Archie and her subsequent dismissal do not disclose discriminatory employment practices. Further, with regard to Mrs. Carter, we find the licensee's explanation as set forth in paragraph 24 herein adequate.

32. The petitioner's allegations concerning the lack of programming for the black community has two aspects. The first concerns the question of discrimination against black recording artists. Generally, this is an area which the Commission is reluctant to enter since the choice of musical selections played is, to a large extent, a matter of the licensee's discretion. Any other decision would place this Commission in the role of a censor, a posture which the Communications Act of 1934 prohibits us from taking. Additionally, BIEA has failed to submit any evidence that the stations made the subject of its petition do, in fact, discriminate against black artists who have recordings consistent with their overall program formats.

33. BIEA's second assertion is that the licensees have failed to present programs of specific interest to minority groups. A licensee is under an affirmative obligation to program to meet the needs and interests of his service area, including service to significant minority groups. This mandate, however, in no way requires that the licensee divide his program schedule so that a percentage of it corresponds to the percentage of minority groups in the community. See *Universal Communications Corp.*, *supra*, and *Stone* v. *FCC*, *supra*. A licensee is faced with many conflicting and competing needs of various groups within his service area. How a licensee responds to these needs is a matter largely within its discretion. "He may not flatly ignore a strongly expressed need; on the other-hand, there is no requirement that a station devote twenty percent of its broadcast time to meet the need expressed by twenty percent of its viewing audience." *Stone* v. *FCC*, *supra*. An examination of each licensee's renewal application discloses that each station has featured programs relevant to community problems, including programs addressed to the problems of various ethnic and minority groups. Further, each of the stations has proposed programming which will adequately meet the ascertained needs and interests (i.e., problems) of its service area. We conclude, therefore, that each licensee in its overall programming has served the needs and interests of the public within its service area.

34. In view of the foregoing, we find that petitioner has failed to raise any substantial and material questions of fact which would warrant exploration in an evidentiary hearing, 47 U.S.C. 309(d)(1). We further find, upon our consideration of the above-captioned license renewal applications and other documents cited herein, that the licensees are qualified and that a grant of the above captioned applica-

tions, with the exception of those for Stations KOIL–AM–FM and KLNG, would serve the public interest, convenience and necessity.

35. Accordingly, IT IS ORDERED, That the petition to deny filed by the Black Identity Education Association is DENIED, and that the above-captioned applications, with the exception of KOIL–AM and FM and KLNG are hereby GRANTED.[7]

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS IN WHICH COMMISSIONER JOHNSON JOINS

This matter is representative of ferment existing in virtually every major city in the country. Specifically, black community groups have petitioned to deny the license renewals of (almost) all broadcast stations in a particular market for failure on the part of the licensees to (1) serve the programming needs and interest of the black community, and (2) eliminate discriminatory employment practices.

In the present matter, the city involved is Omaha, Nebraska, the licensees are KETV–TV, KFAB (AM–FM), KGBI–FM, KLNG, KMTV–TV, KOIL (AM–FM) KOOO, KYNE–TV, WOW, KFMX–FM and WOW–TV, and the petitioner is the Black Identity Education Association ("BIEA"). The allegations proffered by BIEA are unquestionably serious enough to warrant renewal hearings. *Radio Station WSNT, Inc.*, 27 FCC 2d 993 (1971); *Alabama Educational Television Commission*, —— FCC 2d ——, 23 RR 2d 800 (1972).

With respect to the first allegation, inadequate minority programming, the Commission as far back as 1928 (when it was the Federal Radio Commission) held that a licensee must serve the needs of all substantial groups within its service community in some fair proportion. See *Great Lakes Broadcasting Company* [FRC. December 17, 1928]; rev'd on other grounds, *sub nom*, *Great Lakes Broadcasting* v. *FRC*, 59 App. D.C. 197, 37 F. 2d 993 (1930).[1] That venerable case also recognized that, on the question of serving those needs, the Commission can consider programming.[2]

Later, in the *1960 Network Programming Inquiry*, 25 F.R. 729, we stated:

> * * * the principal ingredient of the licensee's obligation to operate his station in the public interest is the dilligent, positive, and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his communities or service area, for broadcast service. 20 RR 1901.

And, on the singular topic of programming for blacks, the Commission has asserted:

> We agree * * * that all broadcasters can make a significant contribution in understanding the serious racial crisis confronting

[7] Final action on the renewal applications for KOIL–AM and FM and KLNG will be deferred pending the outcome of the proceedings in Dockets 19124 and 19274, respectively.

[1] See generally, *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C. 2d 650, 36 Fed. Reg. 4092, 13 RR 2d 1903 (1971).

[2] See also, *F.R.C.* v. *Nelson Bros. Bond and Mortgage Co.*, 289 U.S. 266 (1933); *National Broadcasting Co.* v. *United States*, 319 U.S. 190; *Red Lion Broadcasting* v. *F.C.C.*, 395 U.S. 367 (1969); *Office of United Church of Christ* v. *F.C.C.*, 123 U.S. App. D.C. 328, 359 F. 2d 994 (1966).

> our cities and that there is a need for broadcasters to be more responsive to the problems which exist in Negro communities. *Mel-Lin, Inc.*, 22 F.C.C. 2d 165, 171, 18 RR 2d 787, 794 (1970).

With respect to the second allegation, discriminatory employment, the Commission has no long regulatory trail to meander. But, in a commendable display of social concern, the Commission was the first amongst the independent federal regulatory agencies to require those under its adjudicatory umbrella to establish, maintain and carry out a positive, continuing program of specific practices to assure equal opportunity in station employment. *Nondiscrimination in Broadcast Employment*, 18 F.C.C. 2d 240, 16 RR 2d 1561 (1969). In adopting its equal employment opportunity rules [3] the Commission explained its purpose:

> We propose to require that each station with five or more full-time employees develop an equal employment opportunity program, taking due account of such factors as station size and location, and demographic makeup of the area. [footnote omitted]. The scope of the program would vary with the size of the station and the nature of the community and the racial makeup, but its essential purpose for every station would be to assure equal opportunity in every aspect of station employment practice, including training, hiring, promotion, pay scales and work assignments. *Id.*, 18 F.C.C. 2d at 244, 16 RR 2d at 1566, 1567.

The detailed programs required of licensees were designed to aid "significant minority groups (Negroes, Orientals, American Indians and Spanish Surnamed Americans) which may be in most need of assistance in achieving equal employment." *Id.*, 18 F.C.C. 2d at 244, 16 RR 2d at 1568.

Not only are the foregoing laudatory goals a precatory enunciation of policy, the Commission's EEO requirements are embodied by federal rules (see f.n. 3, supra.) which have the force of law, the violation of which rules could subject a licensee to monetary forfeiture (47 U.S.C. § 503(b)(1)(B)), license revocation (47 U.S.C. § 312(a)(4)), or criminal prosecution (47 U.S.C. § 502).

Today, a black group from Omaha, with admitted standing to participate in this matter, (Memorandum Opinion and Order, pars. 3–5) has filed a number of petitions to deny. Under Section 309 of the Communications Act,[4] petitioners need only make "specific allegations of fact to show * * * that a grant of the application would be prima facie inconsistent with [the public interest]." [5]

Unlike the deficiencies found by the Court in *Stone* v. *F.C.C.* Case No. 71–1166 (D.C. Cir., June 30, 1972), BIEA does plead specific allegations including omissions by several licensees to develop "train-

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[3] As they relate to broadcast facilities, such rules are codified as 47 CFR § 73.125 (AM), § 73.301 (FM), § 73.599 (Educational FM), and § 73.680 (TV). All of those sections require licensees to: Conduct continuing review of job structure and employment practices and adopt positive recruitment, training, job design, and other measures needed in order to insure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility in the station.

The Commission's EEO rues were fortified by *Report and Order*, released June 3, 1970, 23 FCC 2d 430 (1970), which added a new § 1.612 (47 CFR § 1.612) to our Rules. § 1.612, in general, requires licensees to file annual statistical reports (Forms 395) and equal employment programs (Section VI of FCC Forms 301, 303, 309, 311, 315, 340 and 342).

[4] 47 U.S.C. § 309, as amended (1964).

[5] *Id.* at 309(d)(1).

ing, hiring and promotion" programs for minority employees. *Nondiscrimination in Broadcast Employment*, supra, 18 FFC 2d at 244. Another station (KETV–TV), according to BIEA's pleadings, lost two black newsmen, deleted its minority news program, was contacted by a New York City minority training program about the vacancies, and refused to act on the information. *Id.*, par. 25.

In connection with these allegations, and mindful of the requirement that licensees must conduct a continuing, affirmative, equal employment program with "positive recruitment, training, job design, and other measures needed to insure genuine equality of opportunity" (See f.n. 3, supra), the allegations were treated as follows. KETV–TV, as far I can discern from the ruling, has not answered the charge against it. KFAB (AM–FM) retorts: "When vacancies have occurred in the past, we have contacted schools and other employment sources. Minority people with the necessary qualifications have not been available." Memorandum Opinion and Order, par. 10.

The majority ruling regards the allegations and responses as raising no "substantial and material questions of fact warranting a hearing". *Id.*, par. 32. See, however, f.n. 7, infra. But, § 309(d)(2) of the Communications Act merely requires petitioners to make specific "allegations" of fact at this stage of the proceedings;[6] petitioner is not obliged to offer conclusive proof until hearing.

BIEA "specifically" alleges the KFAB (AM–FM) assertion regarding unavailability of qualified minority staff applicants is a "lie".[7] Today's Memorandum Opinion and Order does not even attempt to delve into that conflict; rather the decision erroneously decrees that "petitioner has merely compared the number of minority employees at each station with the station's total employment force", Memorandum Opinion and Order, par. 30, and that "the allegations raised by BIEA have been effectively rebutted by the licensees." *Id.* at par. 35. It follows from the ruling, then, that KFAB (AM–FM) *has* satisfactorily shown the absence of qualified or qualifiable minority applicants when job openings arose. If so, where?

Assume, arguendo, that the aforementioned allegations do not somehow represent "specific allegations of fact." 47 U.S.C. § 309(d)(1). Inaction here by the Commission would still fly in the face of its express posture on equal employment, to wit:

> It has also been urged by a substantial number of parties active in this field that the equal employment opportunity policy cannot be effectively implemented by relying solely upon individual complaints. They point out that consideration of complaints, particularly if referred to other agencies, is time consuming (a point also made by industry parties), and they state their experience that many people will not complain even though they suspect or know they have been treated unfairly in respect either to initial

[6] *Stone* v. *FCC*, supra.

[7] While BIEA's one-word retort as to the verisimilitude of the assertion may not qualify in a majority's view, as a specific factual allegation, 47 U.S.C. § 309(d)(1), it would certainly be sufficient in any legal proceeding, from Common Law to Federal Practice, to trigger a substantial and material factual dispute and isolate a contested issue. Additionally, the Commission is by no means *compelled* to renew because a petition to deny has not achieved some abstract standard of specificity; the Commission may renew only in the absence of "substantial and material question[s] of fact," 47 U.S.C. § 309(d)(2)(e), no matter how those questions surface.

> employment or management practices, that many people will not even seek employment where they believe discriminatory practices to exist and that individuals have great difficulty in demonstrating the existence of discrimination where it does exist.
>
> * * * * * * *
>
> Moreover, reliance solely upon a complaint procedure to implement equal employment opportunity cannot cope with general patterns of discrimination, developed out of indifference as much as out of outright bias.
>
> * * * * * * *
>
> Despite the workload problems, these conditions impel us to adopt further requirements to assure equal employment opportunity especially in view of the urgent national need cited in our earlier opinion. We believe it is vital that such action be taken.[8]

There is no conceivable way I can square the above language with the Commission's summary treatment when alerted by BIEA's averments.

I here stress that I am in no way prejudging the efficacy of BIEA's allegations or assuming EEO rule violations or failure to serve the community on the part of any licensee named; if there are reasonable explanations, particularly with respect to the allegations concerning KFAB (AM–FM) and KETV–TV, I am open to them. I am, though, closed to the Commission's apparent neglect in today's decision to heed Judge Burger's (now Chief Justice Burger) edict in *Office of Communication of the United Church of Christ* v. *F.C.C.* 138 U.S. App. D.C. 11, 425, F 2d 543 (1969), that:

> * * * a "Public Intervenor" who is seeking no license or private right is, in this context, more nearly like a complaining witness who presents evidence to police or a prosecutor *whose duty is to conduct an affirmative and objective investigation of all the facts* and to pursue his prosecutorial or regulatory function if there is probable cause to believe a violation has occurred. *Id.*, 138 U.S. App. D.C. at 115, 425, F 2d at 546 (1969). (Emphasis added).

Hence, not only does the majority (1) abjure from inquiring into the substance of petitioners allegations, *sua sponte*, as it vowed to do in its EEO rule making; (2) overlook controverted—and in several instances uncontroverted—factual allegations evincing possible rule violations; it (3) also fails to follow a fundamental precept of administrative law that "an agency must articulate with clarity and precision its findings and the reasons for its decisions." *WAIT Radio* v. *F.C.C.*, 135 U.S. App. D.C. 317, 320, 418 F 2d 1153, 1156 (1969) (citing Justice Harlan in the *Permian Basin Area Rate Cases*, 390 U.S. 747, (1968)); See also, *560 Broadcast Corporation* v. *F.C.C.*, 135 U.S. App. D.C. 330, 418 F 2d 1166 (1969); *Cf.*, *West Michigan Telecasters* v. *F.C.C.* —— U.S. App. D.C., —— F 2d —— (1972).

In this instance, and although the Commission's "statement of the reasons for denying the [BIEA] petition" is certainly "concise", 47

[8] *Nondiscrimination in Broadcast Employment*, 18 FCC 2d 240, 242–243, 16 RR 2d 1561, 1564–1565 (1969). That document quotes, at length, the view of the United States Civil Rights Commission that complaint-oriented equal employment programs are generally weak and ineffective.

U.S.C. § 309(d)(2), the statutory finding that there "are no substantial and material questions of fact and that a grant of the applications would be consistent with [the public interest]", *Ibid*, has not been made with anything resembling the obligatory lucidity.

Therefore, sharing the concern of the minority groups across this land for a better shake from the broadcast medium and a more understanding ear from the government, at a minimum, I would have looked deeper into the protestations of BIEA. Somebody, someday soon, must get to the source of black disaffection with the media. Omaha is as good a place as any to start.

F.C.C. 72-822

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF CHANNEL 13 OF LAS VEGAS, INC., LICENSEE OF STATION KSHO-TV, LAS VEGAS, NEV.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted September 13, 1972; Released September 15, 1972)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE, AND REID ABSENT.

1. The Commission has under consideration: (1) its Notice of Apparent Liability, dated January 26, 1972, addressed to Channel 13 of Las Vegas, Inc., licensee of Television Broadcast Station KSHO-TV, channel 13, Las Vegas, Nevada; and (2) the licensee's response to the forfeiture notice, dated March 21, 1972.

2. Station KSHO-TV is affiliated with the ABC television network. The Notice of Apparent Liability charged that KSHO-TV on occasions joined the network after sponsored network programs started and discontinued the broadcast of such programs prior to their conclusion, in order to insert local commercial matter during station breaks. In support of that charge, the Notice recited the results of a spot check of five sponsored daytime network programs carried by the station on 20 days from February to November, 1971, comparing the station's logs with the network schedule. In many instances, the material deleted at the end of the programs included the disclosure of receipt of payment for the use or promotion of merchandise on the program, which is required by Section 317 of the Communications Act of 1934, as amended, and by Section 73.654 of our Rules. For example, of the 10 "Let's Make a Deal" programs covered by the spot check, ten deleted all (2) or some (8) of the required sponsor identification announcements. Similarly, all (4) or some (3) of the required announcements were deleted seven times at the end of the "Newlywed Game," and all (4) or some (6) of the required announcements were deleted at the end of ten "Dating Game" programs.

3. While these events were occurring, KSHO-TV was submitting weekly commercial reports to ABC that certified:

> Everything carried according to schedule except as noted in the interruption, deletions, cancellation or preemption column above. In the event any of the programs were not carried in their entirety for any reason not stated herein, payment to the station for such program or programs shall be waived.

The reports did not disclose the deletions mentioned in the previous paragraph. The Notice therefore found that KSHO-TV had incurred

an apparent liability for a $10,000 forfeiture for violating Section 317 of the Act and Sections 73.654 and 73.1205 of our Rules.

4. In its response, KSHO–TV does not deny that it failed to broadcast all of the material fed to it by the network, or that it certified to the network that it carried all of the network material in the instances cited in the Notice. Nonetheless, KSHO–TV asserts that the assessment of a forfeiture lacks legal or factual basis, and that the Notice should be withdrawn. KSHO–TV argues that Section 73.1205 of our Rules does not cover the practices engaged in by the station. Section 73.1205 is as follows:

> Fraudulent billing practices.
>
> No licensee of a standard, FM, or television broadcast station shall knowingly issue to any local, regional or national advertiser, advertising agency, station representaive, manufacturer, distributor, jobber, or any other party, any bill, invoice, affidavit or other document which contains false information concerning the amount actually charged by the licensee for the broadcast of advertising for which such bill, invoice, affidavit or other document is issued, or which misrepresents the nature or content of such advertising, or which misrepresents the quantity of advertising actually broadcast (number or length or advertising messages) or the time of day or date at which it was broadcast. Licensees shall exercise reasonable diligence to see that their agents and employees do not issue any documents which would violate this section if issued by the licensee.

This rule was adopted in *Fraudulent Billing Practices*, 1 FCC 2d 1068 (1965); examples of its applicability are set out in *Applicability of Fraudulent Billing Rule*, 1 FCC 2d 1075 (1965); and the rule was modified in *Fraudulent Billing Practices*, 23 FCC 2d 70 (1970). KSHO–TV asserts that there is nothing in those documents to indicate that the rule was designed to cover anything except "classic" double billing, or that the rule was designed to cover network-station relations, or announcements made pursuant to Section 317 of the Act. The licensee argues that if Section 73.1205 does cover the circumstances in question, the rule is too vague to serve as the basis for a forfeiture.

5. There is no suggestion in the words of the rule that its terms are limited solely to so-called "classic" double billing, however that term may be defined. The wording of the rule is broad in scope. Unlike KSHO–TV, we do not equate breadth with vagueness. As applied to the facts of this case, the rule states, "No licensee of a . . . television broadcast station shall knowingly issue to any . . . party, any . . . document which misrepresents the quantity of advertising actually broadcast (number or length of messages)...." Thus, in our view, as long as the material clipped contained advertising, KSHO–TV's conduct is encompassed by Section 73.1205. It is true that the examples given of fraudulent billing practices in the documents cited above differ from KSHO–TV's activities. However, the examples should not be construed as substitutes for the rule. As we previously stated, ". . . the proposed rule is concerned with the principle involved rather than the form in which it appears . . .." 1 FCC 2d at 1068. We note that the form of fraudulent billing that is presented here has previously resulted in the imposition of forfeitures for violation of Section 73.1205, *Radiozark*

Broadcasting of Louisiana, Inc., 32 FCC 2d 603 (November 29, 1971). See too, *Letter to Wake County Broadcasting Company (WAKS)*, FCC 70–780 (July 15, 1970), and *Letter to Chapman Television of Tuscaloosa, Inc. (WCFT–TV)*, FCC 70–1197 (November 4, 1970).

6. KSHO–TV contends that the clipped material is not advertising. The material in question is broadcast at the end of quiz programs and states essentially that certain prizes or services awarded throughout the course of the program were provided by various firms or that a fee also was paid for their use. We require that such announcements:

> * * * should at least state in language understandable to the majority of viewers that suppliers of goods or services have paid the network or producer of the program to display or promote the products or services, and each such supplier should be properly identified. In order to achieve the purpose of Section 317 and our Rules, the video portion of such announcement should be given in letters of sufficient size to be readily legible to an average viewer; should be shown against a background which does not reduce legibility, and should remain on the screen long enough to be read in full by an average viewer. [(National Broadcasting Co., 27 FCC 2d 75 (December 16, 1970))].

We also stated in that decision that, "if the announcement is given because of the receipt of consideration other than the services or properties exempted under the *proviso* clause of Section 317, it is a commercial announcement and should be so computed," 27 FCC 2d at 76. In this case, the producer of the programs did receive a fee. We conclude, therefore, that the material deleted by KSHO–TV was advertising.

7. By letter dated March 5, 1971, ABC assured us of its compliance with our decision, stating, among other things, that after March 15, 1971, it would use the following disclosure announcement: "The following companies have furnished prizes or paid a fee for their promotion on the program," followed by a list of the companies. However, ABC sought reconsideration as to the requirement that the disclosure announcements at the end of the program be logged as commercial time. Reconsideration was denied in *American Broadcasting Co.*, 30 FCC 2d 827 (June 16, 1971).[1] We stated there:

> The identification of the person paying for exposure of a product or service in a quiz show or audience participation program is no less commercial matter when contained in a "crawl" positioned at the end of a program than when positioned in or in proximity to a commercial spot announcement. The fact that the sponsor's identity is announced at the end of the program, rather than at the time the product or service is advertised, does not change the essential nature of the announcement. It may be noted that the sponsorship identification contained in the "crawl" may also be a form of product or service advertising in that broadcast exposure, implicit in the contractual relationship with the program producer, is provided. The Commission has recognized that

[1] The decision was adopted in our meeting of June 16, 1971. The letter was mailed and public notice of the action was issued the following day, June 17, 1971. Subsequently, when printed for the FCC Reports, a typographical error was made and the date of adoption was given as July 16, 1971.

> even the mere mention of the name of a business entity has commercial advantage. See for example, Note 1 to Section 73.503 of the Rules governing Noncommercial Educational FM Broadcast Stations. (30 FCC 2d at 827)

Thus, initially and on reconsideration we held that the sponsor "crawls" at the end of the programs constitute advertising when consideration is received.

8. KSHO–TV further contends that it receives no compensation for broadcasting the "crawls." Therefore, KSHO–TV concludes that the "crawls" are not advertising. As previously indicated, the programs in question are sponsored network programs. The station receives compensation from the network for carrying such programs. The affiliation contract between ABC and KSHO–TV states that, in exchange for compensation, KSHO–TV agrees ". . . to broadcast network sponsored programs in their entirety, including but not limited to the network commercial announcements, network identifications, program promotional material or credit announcements contained in such programs which you accept, without interruption or deletion or addition of any kind." Thus, contrary to KSHO–TV's contention, it is compensated for broadcasting the *entire* network sponsored program. KSHO–TV's argument must, therefore, be rejected.

9. KSHO–TV argues that it is unfair to hold it liable for violating Commission rules as interpreted by the *National Broadcasting Co.*, and *American Broadcasting Co.*, cases, above, since only three of the violations cited in the Notice occurred after the decision denying reconsideration.[2] However, Section 405 of the Act states, in part, "No such application (for reconsideration) shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission." Thus, the decision we are concerned with, in terms of compliance with the rule, is the decision of December 16, 1970, since we issued no "special order" deferring its effective date. All of the examples given in the Notice fall well after that date. Accordingly, we find no unfairness in holding KSHO–TV liable for its actions taken after public notice of the decisions was given on December 17, 1970.

10. KSHO–TV asserts that the Notice lacks the facts necessary to establish violations of Section 317 of the Act and Section 73.654 of our Rules pertaining to sponsor identification. KSHO–TV takes the position that no violations can be found unless the clipped "crawls" contained sponsor identifications required by Section 317. The Notice stated that the "crawls" were required according to ABC. KSHO–TV states that it isn't prepared to accept ABC's determination because, in the area of prizes or services awarded in contest or giveaway programs, the determination as to what is and what is not required sponsor identification can be very close, citing example 23 of the *House Report on Communication Act Amendment*, House Report No. 1800, 86th Congress, 2d Session, Pike & Fischer Radio Regulation, Current Service,

[2] Relying on the date appearing in the FCC Reports, KSHO–TV found only one violation cited in the Notice after the date of the decision denying reconsideration. In view of the typographical error described in the preceding footnote, KSHO–TV's argument must be based on three dates; that is, those violations occurring after June 17, 1971.

pp. 10:413, 10:429–30 (1960). KSHO–TV contends, therefore, that in order to judge whether the "crawls" at the end of the program were required, the insufficiency of any announcements made during the program must be established. However, in the programs cited in the Notice, no announcements or disclosures as to consideration appeared during the body of the program, only at the very end.[3] Thus, the question of whether anything said during the body of the program was sufficient for Section 317 purposes does not arise. We conclude that KSHO–TV did delete portions of the programs which contained sponsor identifications required under Section 317 of the Act and Section 73.654 of our Rules.

11. KSHO–TV alleges that the Notice is not clear as to whether the violations of Section 317 of the Act and 73.654 of our Rules are an independent basis for the forfeiture, in addition to the violations of Section 73.1205. Therefore, KSHO–TV concludes that the Notice is invalid under Section 503(b)(2) of the Act as lacking specificity.[4] We have no such difficulty with the Notice. It clearly states that a forfeiture was imposed "for willfully or repeatedly failing to observe the provisions of Section 317 of the Communications Act and Sections 73.654 and 73.1205 of the Commission's Rules and Regulations." The facts upon which the violations were founded were set out in the body of the Notice. In our view, all elements required by Section 503(b)(2) of the Act were supplied by the Notice. We therefore reject KSHO–TV's position.

12. KSHO–TV notes that in the *National Broadcasting Co.* and *American Broadcasting Co.* cases, above, we asked only for a statement from the networks as to what they proposed to do in view of our ruling. Since we held KSHO–TV apparently liable for a $10,000 forfeiture, KSHO–TV argues that it is being held to a harsher standard than the networks. The different treatment, according to KSHO–TV, is contrary to the requirements of *Melody Music, Inc.* v. *FCC*, 345 F. 2d 733, 4 RR 2d 2029 (D.C. Cir. 1965). There, the court remanded the case to us for an explanation as to the different treatment accorded two parties when both were engaged in essentially the same misconduct. In this case, the networks were asked what they proposed to do to bring their logging practices into compliance with our ruling. Every indication in the networks' statements indicates that their logging practices prior to our ruling were based on their good faith interpretations of our Rules and the Act. They brought their conduct into compliance with our ruling after it was issued. There is no basis for imputing fraud to the networks' actions. KSHO–TV, on the other hand, for approximately eleven months after the Commission had specifically ruled in its letter to NBC that the sponsorship identification "crawls" were commercial matter, continued to delete network material that contained the required sponsor identification. Furthermore, it continued to certify

[3] Our basis for this conclusion is the following statement from ABC: * * * the announcement that a fee had been paid in addition to the donation of the prize itself was made solely at the end of the program in the disclosure announcement. No disclosure occurred during the body of the program. * * *

[4] Section 503(b)(2) provides, in part: A notice issued under this paragraph shall not be valid unless it sets forth the date, facts, and nature of the act or omission with which the licensee or permittee is charged and specifically identifies the particular provision or provisions of the law, rule, or regulation or the license, permit, or cease and desist order involved.

falsely to the network that all network material, "without deletion . . . of any kind," was being broadcast. Thus, we consider KSHO–TV's conduct to be readily distinguishable from that of the networks. We further consider KSHO–TV's conduct to be a serious departure from the degree of responsibility we expect of a licensee. We therefore conclude that the holding of the *Melody Music* case is inapplicable to the facts presented here.

13. KSHO–TV believes that the amount of the forfeiture is excessive, particularly in view of the financial difficulties of the station. We considered the station's financial condition at the time we issued the Notice. We find no basis for changing our determination.

14. In view of the above, IT IS ORDERED, That the request of Channel 13, of Las Vegas, Inc., licensee of Station KSHO–TV, Las Vegas, Nevada, that the Notice of Apparent Liability be withdrawn, IS DENIED.

15. IT IS FURTHER ORDERED, That Channel 13 of Las Vegas, Inc., FORFEIT to the United States the sum of ten thousand dollars ($10,000) for violations of Section 317 of the Communications Act of 1934, as amended, and Sections 73.654 and 73.1205 of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

16. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested, to Channel 13 of Las Vegas, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-877

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of THE COURT HOUSE BROADCASTING CO., ASSIGNOR and CHILLICOTHE TELCOM, INC., ASSIGNEE Application for Voluntary Assignment of License for Radio Station WCHI-AM, Chillicothe, Ohio	Docket No. 19600 File No. BAL-7227

ORDER

(Adopted October 5, 1972; Released October 13, 1972)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND REID ABSENT.

1. We have before us for consideration the above-captioned application for assignment of the license of radio station WCHI-AM, Chillicothe, Ohio. Upon complete review of the application and related documents, we find that the assignee is legally, financially, technically and otherwise qualified, and except for the matters discussed below a grant of the application would serve the public interest, convenience and necessity.

2. Historically, the Commission has been concerned with the possible adverse impact that could occur if a common carrier were permitted to become a program originator. This concern was expressed most recently in the rule making proceeding which resulted in the adoption of the new CATV Rules.[1] With the subject application, we are squarely confronted with this policy question and, therefore, cannot make the requisite public interest finding without first determining it.

3. We find that a review of the application raises no substantial or material questions of fact, rather our concern rests with the question of whether a telephone common carrier should be permitted to acquire and operate a broadcast facility. Only where the public interest cannot be determined without a resolution of disputed facts has Congress dictated that we must conduct an evidentiary hearing, *Marsh* v. *FCC*, 436 F. 2d 132, 135-136 (D.C. Cir. 1970). (See also *Chuck Stone* v. *FCC*, No. 71-1166 (D.C. Cir.) (Order June 30, 1972) slip op. p. 8 and *Broadcast Enterprises, Inc.* v. *FCC*, 390 F. 2d 483, 485 (D.C. Cir. 1968).) Since the only matter requiring resolution is this policy question, about which there is no underlying factual dispute, an evidentiary hearing is unnecessary and in lieu thereof an oral argument will be held before us on the policy question.

[1] Final Report and Order in Docket #18509, 21 FCC 2d 307 (1970); see also Notice of Proposed Rule Making in Docket #18397, 15 FCC 2d 417, 421 (1968).

4. In order to insure the widest possible participation in determining this policy question, we are inviting other interested parties, as well as the applicants, to make an oral presentation directed to the above mentioned policy consideration. Such a presentation will be made before the Commission *en banc*. To facilitate the oral presentation, all parties desiring to participate are requested to file written briefs in support of their positions. The applicants may, in their brief and oral presentation, direct specific reference to the subject application and how a grant thereof will serve the public interest. Other participants are requested to direct their attention solely to the policy question of whether the public interest would be served by permitting a telephone common carrier to become a broadcast licensee. Because there is a need to expedite consideration of this matter, no extensions of time for either the filing of briefs or the oral presentation are contemplated.

5. IT IS THEREFORE ORDERED, That the above captioned assignment application for radio station WCHI–AM, Chillicothe, Ohio IS DESIGNATED FOR ORAL ARGUMENT before the full Commission upon the following issue:

> Whether the public interest would be served by permitting a telephone common carrier to acquire and operate a broadcast facility within its exchange area.

IT IS FURTHER ORDERED, That written briefs will be filed by October 27, 1972, reply comments will be due November 8, 1972, and oral presentation will take place before the full Commission on November 20, 1972 commencing at 9:30 a.m., in Room 856, 1919 M Street, N.W., Washington, D.C.

6. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicant, Chillicothe Telcom, Inc., and other interested parties, including the Broadcast Bureau, pursuant to Section 1.221(c) of the Commission Rules, in person or by attorney, shall, within twenty (20) days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date set for the oral presentation and present their position on the issue specified in this Order.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-835

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Petition by
DEMOCRATIC PARTY OF ARIZONA
To Deny Application for Assignment of
Station KPHO, Phoenix, Ariz.

SEPTEMBER 20, 1972.

Mr. HERBERT ELY,
Care of Democratic Party of Arizona.

DAIRYLAND MANAGERS, INC.,
5018 Milward Drive,
Madison, Wis.

PHOENIX BROADCASTING CO.,
111 West Monroe Street,
Phoenix, Ariz.

GENTLEMEN: On September 20, 1972, the Commission granted the application for assignment of the license of Station KPHO, Phoenix, Arizona from the Meredith Corporation to Dairyland Managers, Inc. (BAL-7445); and the application for the assignment of the license of Station KHAT, Phoenix, Arizona from Radio K-HAT, Inc. to Phoenix Broadcasting Company (BAL-7643).

On November 29, 1971 the Democratic Party of Arizona filed a petition to deny the application for assignment of Station KPHO. The petition basically alleged that the sale of KPHO, an all news station, to a purchaser proposing a Country and Western format, would result in a substantial diminution of news programming in the Phoenix Metropolitan Area contrary to the public interest. On June 21, 1972 this petition was withdrawn on the following condition:

> That the FCC first approves the transfer of license for radio Station KHAT from KHAT Radio, Inc. to Phoenix Broadcasting Company, and that Phoenix Broadcasting Company actually commences operation of that station with an all news and public affairs format in accordance with the license application to be filed by Phoenix Broadcasting Company devoting not less than fifty-three percent (53%) of its broadcast time to news and public affairs.

The decision of Phoenix Broadcasting Company to devote 53% or more of its broadcast time to news and public affairs, in accordance with the above condition of the Democratic Party of Arizona, comes within the discretion of the licensee in meeting in good faith and equitably the needs and interests of his area. See 1960 Programming Statement, 20 RR 1902 (1960). We believe it appropriate, however, to note one possible problem with the condition and to make clear what the licensee's responsibilities are in this area. The ultimate re-

sponsibility in the matter of programming must lie with the licensee. As we emphasized in Attachment A to Section IV–B of the assignment application (FCC–314):

> * * * Broadcasters, mindful of the public interest, must assume and discharge responsibility for planning, selecting and supervising all matter broadcast by their stations * * *

The condition required by the Democratic Party pursuant to which its petition to deny was withdrawn—a minimum of 53% of broadcast time devoted to news and public affairs—is ambiguous in that it may be intended to foreclose the possibility of Phoenix Broadcasting Company broadcasting less than the specified amount of news and public affairs. We therefore stress that the condition is to be construed and implemented in accordance with the above fundamental policy, and that any condition that is in fact intended to curtail improperly the licensee's discretion to make programming judgements in the public interest would of course be of no force or effect.

Chairman Burch and Commissioner Johnson abstaining from voting; Commissioner H. Rex Lee absent.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 72-891

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
ALAN F. NECKRITZ AND LAWRENCE B. ORDOWER, BERKELEY, CALIF., CONCERNING FAIRNESS DOCTRINE RE STATIONS KGO-TV, KRON-TV, KPIX, KNBC, and KNXT

MEMORANDUM OPINION AND ORDER

(Adopted October 5, 1972; Released October 17, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT: COMMISSIONER H. REX LEE NOT PARTICIPATING; COMMISSIONER REID ABSENT; COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. The above-captioned proceeding has been remanded to the Commission for reconsideration by the Court of Appeals. Subsequent to the Commission's initial decision, *In Re Complaint of Alan F. Neckritz*, 29 F.C.C. 2d 807 (1971) (hereinafter cited as *Chevron*),[1] the Court of Appeals reversed another Commission decision (*In Re Complaint of Friends of the Earth*, 24 F.C.C. 2d 743 (1970), reversed *sub nom. Friends of the Earth* v. *F.C.C.*, 449 F. 2d 1164 (1971)) [2] dealing with the applicability of the fairness doctrine to product advertisements for high performance cars and high octane gasoline. The Commission had cited this case with approval in *Chevron*. In view of the Court's reversal, and the fact that both cases involved the applicability of the Fairness Doctrine to product commercials for gasoline, the Commission moved the Court to remand the present case for further

[1] In *Chevron*, the complaint filed against five California television stations, alleged licensee failure to fulfill their Fairness Doctrine and public interest obligations with respect to the broadcast of Chevron F-310 gasoline commercials in that (1) licensees presented only one viewpoint (that of the advertiser) on a controversial issue of public importance discussed in the ads, i.e. whether Chevron with F-310 contributes to the solution of the air pollution problem, and (2) licensees failed to protect the public from advertising which was misleading and deceptive, pursuant to their obligations under the public interest standard of the Communications Act. Complainants requested that the Commission order licensees to cease broadcast of the ads and, pursuant to the Fairness Doctrine, to present spot announcements in opposition to the views presented in the ads. The Commission declined to order the requested relief and ruled that the Chevron F-310 ads did not argue a position on a controversial issue of public importance, but rather stated a claim for product efficacy. The Fairness Doctrine was intended to illumine significant public issues, and the claim of efficacy or utility of any particular product was not such an issue, the Commission stated. It also held that the pendency of an unresolved FTC complaint did not compel cessation of the advertisement complained of, and that all licensees involved in this case had fulfilled their public interest obligations.

[2] In *Friends of the Earth*, the Court held that advertisements broadcast in New York City encouraging the use of high performance cars and high test gasoline presented a viewpoint on a controversial issue of public importance, given public and governmental concern with, and evidence about, the danger of air pollution to health and the relation of automobile emissions to air pollution. Under the doctrine approved in *Banzhaf* v. *F.C.C.*, 405 F. 2d 1082 (1968), cert. denied *sub nom., Tobacco Institute* v. *F.C.C.*, 396 U.S. 842 (1969), which the Court found to be indistinguishable from *Friends of the Earth*, the Court held the Fairness Doctrine to be applicable.

deliberation. The Court, maintaining jurisdiction, remanded the matter to the Commission, granting it authority to rule on complainants' request for interim relief and to consider its ruling in respect to both the fairness and deceptive advertising issues. Shortly thereafter, the Commission requested the parties to the proceeding to submit their views on the following questions: (1) whether petitioners' request for interim relief should be granted pending Commission reconsideration of the case;[3] (2) what effect, if any, does the Court's decision in *Friends of the Earth* have on the Commission's resolution of the Fairness Doctrine issue and (3) whether the Commission should reconsider the deceptive advertising issue of the case. Licensees were also requested to advise the Commission of the dates and times of carriage of the advertisements complained of, and of any material broadcast which advised the public of the controversy concerning the Chevron F–310 advertisements.

2. In response to the Commission's inquiry, Petitioners reiterate their complaint that the Chevron F–310 commercials presented one side of a controversial issue of public importance by making the claim that F–310 was a means of solving the air pollution crises in light of the fact that (1) the truth of the claim was disputed by state agencies, and (2) the fact that gasoline emissions from automobiles are a prime source of air pollution which is a problem of public importance in California. Complainants allege that licensees have failed to present opposing viewpoints on this issue as required by the Fairness Doctrine. They further argue that the controversy concerning Chevron F–310 gasoline is identical to the controversy in *Friends of the Earth*, and that the precedent and rationale upon which the Commission relied in its original *Chevron* opinion have been rejected by the Court of Appeals in its reversal of the Commission's decision in *Friends of the Earth*. Finally, Complainants argue that the public interest standard of the Communications Act obliges the Commission to require licensees to protect the public from deceptive F–310 advertising. Licensees' broadcast of the ads is inconsistent with their public interest obligations under current FCC regulations, complainants maintain, in view of the FTC's charges, the reports of two state agencies, the criticisms of leading environmental groups, the fact that the advertiser modified the commercials and that one licensee (KPIX) concluded that they might be misleading, and in view of the fact that the F–310 claims are extravagant on their face.

3. Licensees, with the exception of KRON and KPIX,[4] and the intervenors, Standard Oil of California (Standard) argue, in response to Complainants, that the *Banzhaf* and *Friends of the Earth* cases do not apply to the instant proceeding inasmuch as they are distinguishable. Licensees argue that: (1) *Chevron*, unlike *Friends of the Earth*,

[3] The Commission denied petitioners request for interim relief on April 21, 1972 (34 F.C.C. 2d 579 (1970)). Petitioners renewed their motion for interim relief before the U.S. Court of Appeals which was denied by order dated June 20, 1972.

[4] KPIX regards the controversy about the Chevron F–310 ads as one facet of a larger controversial issue of public importance relating to air pollution which the station has considered extensively in its programming, and also believes that *Friends of the Earth* is applicable to the current controversy. KPIX is opposed, however, to Commission reconsideration of the deceptive advertising issue; believes that the initial decision was correct; and suggests that any change to the Commission's established policies would be most appropriately effected through a rule making proceeding where all interested parties could comment rather than through an *ad hoc* adjudication. KRON failed to respond to the Commission's letter of inquiry.

is not a case in which there is "undisputed evidence"—or even a claim—that the advertised gasoline contributes more significantly to air pollution than other gasolines; and (2) the *Chevron* ads, unlike the *Friends of the Earth* ads, do not emphasize the product attributes of power and performance which can be said to contribute to the pollution problem. In *Friends of the Earth*, licensees observe that the Court did not hold that all advertisements for gasoline raised controversial issues, but that both these factors, i.e. undisputed evidence of contribution to pollution and glorification of attributes aggravating pollution, were crucial to the Court's decision that the hazard to health issue of *Banzhaf* was indistinguishable from that in *Friends of the Earth*. The Chevron F–310 advertisements, on the other hand, raise no public health issues, and the question in dispute is whether or not the product will perform as claimed. Licensees further refute petitioners' fairness complaint by arguing that the Chevron commercials are only one facet of the general problem of air pollution, and that they have informed the public of the anti-pollution viewpoint as indicated by their program analysis. Standard Oil of California further argues that counter advertising against the product categories complained of in *Banzhaf* and *Friends of the Earth* (cigarettes, high performance cars and high octane gasoline) presents consumers with a choice to use or not to use such products. Counter advertising against a single brand, as in *Chevron*, presents no similar choice but attempts to persuade consumers to buy another brand within the same product category. Whether a person buys a product category, like cigarettes, may be an issue of public importance, but whether he buys brand A or brand B cigarettes is not, Standard maintains. Therefore, despite the fact that a particular product claim may raise a controversial issue, that issue is not of public importance, and the Fairness Doctrine is consequently inapplicable.

4. As to the deceptive advertising issue, licensees and Standard argue that the Commission should affirm its initial decision in *Chevron*. They observe that the claim that the ads are false and deceptive and that licensees have consequently failed to protect the public, assumes that which is yet unproven. Contrary to the allegations, licensees' conduct has been reasonable and consistent with present Commission standards, they maintain, given the fact that the ads have not yet been judged misleading and deceptive by the FTC. Licensees state that the FTC has primary authority and that the FCC has no resources or standards of jurisdiction for deciding the deception question, and should not modify its policy as to licensees' responsibility in this area without first affording interested parties an opportunity to comment in a rule making proceeding.

5. We have reconsidered our original ruling in the light of the Court's decision in *Friends of the Earth*. In our opinion, this decision does not require an extension of the Fairness Doctrine to the facts of the present case.

6. Originally, our application of the Fairness Doctrine to product advertising was intended to be limited to a single product. We believed that cigarettes were distinguishable from other products "* * * since smoking them is a habit 'which can fade away' without impact upon other aspects of life, and which official voices have urged the

public to avoid or abandon." *Friends of the Earth*, *supra* at 1167. The Court of Appeals held that we could not "plausibly differentiate" cigarette advertisements from certain commercials promoting large-engine cars and high-test gasolines. The Court found "undisputed evidence" that these products, like cigarettes, significantly enlarged and aggravated existing public health hazards. Furthermore, it was noted that both public and private voices had encouraged the people to avoid the use of these products.

7. The facts of the present case are quite different from those presented in the cigarette case and in *Friends of the Earth*. There is no evidence which would indicate that the Chevron additive F–310 in any way enlarges or aggravates hazards to the public health. Chevron with F–310 is not alleged to be more dangerous than any competing product. Petitioners do not urge the public to abandon the use of gasoline, or even to avoid using Chevron with F–310. It is clear, therefore, that the broadcast of contrasting views in the present case would not provide a health service similar to exhortations to stop smoking, or to drive cars with reduced horsepower and use gasolines with a low-octane rating.

8. Even assuming arguendo that a public health issue is involved here, the present case is still distinguishable from *Friends of the Earth*. The scientific evidence in this case is far from "undisputed." Chevron has amassed considerable evidence to support the proposition that its product will, in fact, contribute to a reduction of the air pollution problem. In these circumstances, there is no way that we can say with any certainty that the broadcast of contrasting viewpoints here would provide a valuable public health service to the American people.

9. Public health considerations aside, we remain convinced that traditional Fairness Doctrine principles do not require the broadcast of views in opposition to the F–310 advertisements. We are still of the opinion that these announcements did not argue a position on a controversial issue of public importance, but merely advanced a claim for product efficacy. In our original opinion, we stated that "[t]he merits of any one gasoline, weight reducer, breakfast cereal or headache remedy—to name but a few examples that readily come to mind—do not rise to the level of a significant public issue." *Chevron*, *supra*, at 812. The critical consideration here is that we should not substitute our judgment for the reasonable programming judgments of our licensees. As we stated in our Fairness Primer:

> * * * the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved * * * In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee * * * but rather to determine whether the licensee can be said to have acted reasonably and in good faith. Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 2 R.R. 2d 1901, 1904 (1964).

In the circumstances, there is simply no persuasive showing that our licensees have not acted "reasonably and in good faith" in determining that the Chevron F–310 advertising claims did not constitute a discussion of a controversial issue of public importance.

10. In our original opinion we expressed a concern that a contrary ruling would, in effect, extend the application of the Fairness Doctrine to an endless variety of advertisements for commercial products. Such a ruling would likely create an administrative nightmare for this agency as well as its licensees, and could have disastrous economic consequences for our entire commercial system. At the present time, we are conducting an over-all review of the Fairness Doctrine (Docket No. 19260). This study includes a detailed analysis of the merits of various "counter advertising" proposals, including suggestions similar to those advanced by the Petitioners in this case. At the end of this study, we hope to be in a position to balance more intelligently likely gains to public enlightenment against the threats these gains may present to the economic base and sound administration of the commercial broadcasting system. In the meantime, we are convinced that our present policy is the one best designed to further "* * * the larger and more effective use of radio in the public interest." 47 U.S.C. § 303(g).

11. Finally, we believe that our original opinion in *Chevron* as to licensees' public interest obligations with respect to advertisements subject to an FTC complaint should be affirmed. Petitioners have presented no additional information on reconsideration to persuade us otherwise. Without repeating our earlier decision we emphasize again that only the FTC and the courts have the jurisdiction to decide whether the technical claims made by Standard in its ads are accurate or not. Certainly this Commission possesses no comparable authority or expertise to resolve such questions, and we have noted that, "* * * we do not believe it to be either reasonable or feasible to impose upon the [broadcasting] industry requirements for medical or other scientific testing procedures * * *" that would make "* * * licensees into a kind of mini-FTC." *In Re Complaint by Consumers Association of District of Columbia*, 32 F.C.C. 2d 400, 406 (1971). There is substantial evidence in this case that licensees judgments were reasonable and consistent with Commission requirements that particular care be exercised in accepting for broadcast an advertisement subject to FTC complaint, in that "* * * all five stations either requested documentation of the advertiser's claims or made changes in the content of the advertisments * * *" *Chevron*, *supra* at 813. We therefore are not warranted in reversing their judgments.

12. In effect, a grant of Petitioners' demands here would require that the FCC abandon its traditional policy in this area, and instead impose a duty on licensees to either (a) automatically terminate carriage of an advertisement subject to an FTC complaint, or (b) automatically present a "counter-advertisement." Such a drastic modification of existing policy can most responsibly be considered in an overall proceeding. In such a proceeding countervailing public interests can be weighed, and all interested parties can be afforded opportunity to comment. In our Fairness Inquiry in Docket No. 19260 we specifically requested the submission of views on the deceptive advertising issues raised in this case. The Commission will have the opportunity to deal with these issues at the conclusion of the inquiry.

13. On reconsideration, and for the reasons stated above, our earlier decision IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

This Commission, in its first *Chevron* opinion, came to the specific conclusion that it "did not know of a product other than cigarettes which would trigger the Fairness Doctrine." Fairness Doctrine Ruling, 29 F.C.C. 2d 807, 814 (1971). It based that decision in no small measure upon its similar ruling in *Friends of the Earth*, 24 F.C.C. 2d 743 (1970), handed down some months previously. Now the Court of Appeals has reversed *Friends of the Earth*, 449 F. 2d 1164 (D.C. Cir. 1971), and in doing so has said that gasoline could be such a product.

Since the Court's decision in *Friends* rendered the Commission's original *Chevron* reasoning even more tenuous and flimsy than I found it to be in my original dissent, 29 F.C.C. 2d, at 814 (1971), the Court quite naturally gave the Commission a chance to correct itself by remanding the case to us for another look. The majority of the Commission, however, appears to have been unpersuaded as to the authority of our D.C. Circuit Court of Appeals to rule as it did in *Friends*, for its decision today is little more than a cavalier reaffirmation of its first *Chevron* decision. Indeed, where the obvious parallels between this case and the Court's decision in *Friends* are considered at all, the majority merely dismisses them with no attempt at analysis.

Licensees assert (and the majority accepts) that it was the intention of the Court of Appeals that the decision in *Friends of the Earth* be limited to the specific fact situation (or the specific ad format) involved in that case. They contend that "undisputed evidence of contribution to pollution *and* glorification of attributes aggravating pollution *was* (sic) *crucial* to the Court's decision." [emphasis added]

Nowhere in the Friends opinion was there language, however, that would lend support to the second contention. Indeed, the Court stated what it considered to be *its* criteria quite succinctly:

> When there is undisputed evidence; as here, that the hazards to health implicit in air pollution are enlarged and aggravated by such products, the parallel with cigarette advertising is exact. * * *

Friends of the Earth v. *F.C.C.*, 499 F. 2d at 1169 (D.C. Cir. 1971). The specific format of the ad was never mentioned by the Court in *Friends* as "crucial" to its application of the Fairness Doctrine. Rather, the Court accepted the Commission's own assertion that

> * * * the crucial issue in this case is whether the Commission reasonably refused to extend to gasoline and automobile commercials its ruling with respect to cigarette commercials.

The Court said

> We have no difficulty in accepting this formulation of the issue, involving as it does a comparison of the record before us with that before the Commission and the Court in *Banzhaf. Id* at 1168.

Noting the Commission's recognition of the

> * * * persuasiveness of expert evidence from both official and private quarters, of the very real dangers to health presented by air pollution, and the significant degree to which automobile emissions both create and aggravate the air pollution problem,

It then went on to hold that

> * * * we are unable to see how the Commission can plausibly differentiate the case presently before us from *Banzhaf* insofar as the application of the Fairness Doctrine is concerned.

Friends of the Earth v. *F.C.C.*, 499 F. 2d at 1170 (D.C. Cir. 1971). A careful examination of the Court's language discloses its ultimate concern with the problem of automobile emissions which "both create and aggravate the air pollution problem."

Licensees argue that petitioner's complaint should fail because "Chevron with F–310 is not alleged to be more dangerous than any competing product." They thereby fail to recognize the concern either of the viewing public or of the Court. The attempted reasoning is that there is no "undisputed evidence" that Chevron contributes *more* to pollution than any other gasoline. But that quite simply is not the issue. Chevron's ads did not say "We don't pollute the air any more than Texaco or Union." Such an ad might well be unlikely to raise significant public health issues.

What the Chevron ad did say was that, "Our gasoline with F–310 is contributing to the solution of the air pollution problem." We need not even pass upon the veracity of that statement. Truth is not relevant to this particular fairness inquiry. All we need acknowledge is that the statement relates to a *controversy*. It is sufficient for fairness purposes to note that agencies like the California Air Resources Board and the Hawaiian State Consumer Protection Agency, among others, vigorously controvert Chevron's contention.

Under the law as it stands after *Friends*, one threshold of fairness doctrine liability is reached when the product itself is recognized as a hazard to health. Even so, it would be difficult as yet to find, based on *Friends* and *Banzhaf* alone, that merely advertising such a product would be enough to force the stations across that threshold. More, it seems, is still required. In *Friends*, for example, the Court indicated that fairness liability was triggered by the active promotion of higher-powered varieties of an unhealthy product.

But that does not preclude other types of gasoline promotion from triggering fairness liability. Although the ads in *Chevron* admittedly differ from those in *Friends*, in point of fact they differ by creating an even *greater* apparent broadcaster liability. If anything, the need for protection of the public interest in this case is even more compelling than it was in *Friends*, for in *Chevron* the controversy itself is openly discussed within the format of the ad. The Chevron ads cannot be considered just another type of misleading promotion.

Nevertheless the licensees and the majority of the members of this Commission persist in "crying wolf" over this case by raising the apocalyptic spectre of an "administrative nightmare" that might result from a reversal of this decision. "Disastrous economic consequences for our entire commercial system" is the way they describe it. One might better point out the "disastrous health consequences for

our entire human system" from the failure to take action. Rather than argue the merits of those contentions, in light of the responsibility of this agency to regulate industry, not be regulated by it, let us simply agree that the entire question of "administration" is spurious to a cogent decision of the issues of this case.

Contrary to licensees' suggestion, this is not merely a claim for "product efficacy"—a boast that Chevron with F–310 will give you a cleaner engine, more miles to the gallon, or put a tiger in your tank. Petitioners have singled out the Chevron commercial for this challenge for one very good reason: Chevron's particular misleading claim happens also to be an extremely *controversial* one.

In other words, the majority's analysis is fallacious when it argues that a decision for petitioners in this case would impose a duty on licensees "* * * to either a) automatically terminate carriage of an advertisement subject to FTC complaint, or b) automatically present a 'counter-advertisement.'"

To the contrary, Chevron, via its "solving air pollution" claim, is taking itself out of the realm of ordinary "misleading" advertising and placing itself in a much smaller category of advertisers who discuss their product in terms of some particular public quest for solution of a controversial problem.

Chevron has chosen, by *its* use of the ad copy in question, to attempt to capitalize on the existence of the air pollution issue. In doing so, it should recognize that if it makes statements which can be controverted by recognized, public sources (which it has), it triggers in the stations carrying its ads the absolute obligation to enlighten the public as to the alternative arguments.

The Court of Appeals in *Friends* found that gasoline products and the pollution problems they created can entitle the public to as great a measure of care from broadcasters under the Fairness Doctrine as did advertisements for cigarettes. Could this Commission have permitted some individual brand of cigarettes to advertise their new charcoal filter as "contributing to the solution of the lung cancer problem" without obligating the station carrying such an ad to provide further explication? I think not. And yet this is precisely the analogy that must be made in this case.

The Court has made absolute the correlation between the cigarette problem and the air pollution problem in the realm of controversial issues of public importance. We must assume that the Court did not lightly "remand" a case before it to this Commission "for consideration in the light of our decision in *Friends of the Earth*." If the *Friends* decision can be dismissed with as facile an effort at reevaluation as the Commission gives it in consideration of *Chevron*, there would have been no reason for the Court to remand in the first place.

I dissent.

F.C.C. 72-882

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (GREENVILLE, KY.; BURNSIDE, GREENSBURG, AND JAMESTOWN, KY.; OAK RIDGE AND JAMESTOWN, TENN.; PINEVILLE, BARBOURVILLE, AND MIDDLESBORO, KY.; AND BIG STONE GAP, VA.)	Docket No. 19074

MEMORANDUM OPINION AND ORDER

(Adopted October 5, 1972; Released October 11, 1972)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND REID ABSENT

1. The Commission here considers the Petition for Reconsideration filed by Veer Broadcasting Company, Inc. from that portion of the Report and Order, adopted January 12, 1972, denying the proposal for allocating Channel 276A to Greensburg, population 1,990, the seat and largest community of Green County, population 10,350, to be used one mile or more northeast of the city. 32 FCC 2d 937, 938–940.

2. In denying the assignment to Greensburg, we relied primarily on the fact that the petitioners Messrs. Milby and Price had not commented in the proceeding thus "evidencing a present lack of interest" (32 FCC 2d at 939), while Welby Hoover, d/b/a Lake Cumberland Broadcasters (Lake Cumberland), the licensee of Station WJRS–FM Jamestown, Kentucky, had opposed the assignment (primarily on the basis of considerations of reimbursement). As to reimbursement, it is "well settled" law that operating stations are entitled to reasonable payment; see paragraph 15 of the Notice; paragraph 11 of the Second Report and Order in Docket No. 18476, 26 FCC 2d 162, 166 (1970); paragraph 14 of the Report and Order in this docket (32 FCC 2d at 942–3). In this respect, Lake Cumberland's claim for loss of listeners and good will, money and time expended for programming, and jingles to promote its current frequency are not reimbursable costs under the cited cases. We also rejected Lake Cumberland's other contentions—that service from its station to Greensburg (a distance of 30 miles) especially public service and public affairs programmings and that WJRS–FM earns some revenue from Greensburg—were not reasons for rejecting an allocation to Greensburg under Section 307(b) of the Act. While we stated that there was no presumption because of such failure, we speculated that petitioners' interest had waned because of the financial burden of building AM Station WGRK and the need to reimburse Station WJRS–FM to change from Channel 276A to 285A.

3. In fact, it appears that Messrs. Milby and Price had lost interest in

radio service at Greensburg. They had relinquished their interest in Veer Broadcasting Company, Inc. (Veer Broadcasting) to Robert L. Towers and James M. Hay. Veer Broadcasting was granted AM Station WGRK at Greensburg. Veer Broadcasting then filed a petition for reconsideration in this proceeding.

4. We deferred action on the petition for reconsideration pending an agreement between Veer Broadcasting and Lake Cumberland as to reimbursement. The parties have now negotiated such an agreement, although Lake Cumberland will recover only from the successful applicant for Channel 276A. Accordingly, we deem it in the public interest to allocate a channel to Greensburg and change the assignment at Jamestown. Authority for adoption of the amendment proposed herein is contained in Sections 4(i), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended.

5. In accordance with the foregoing, IT IS ORDERED, That, effective November 20, 1972, the FM Table of Assignments (Section 73.202 (b) of the Rules) IS AMENDED, with respect to the cities listed below, as follows:

City	*Channel No.*
Greensburg, Kentucky	276A
Jamestown, Kentucky	285A

6. IT IS FURTHER ORDERED, That, effective November 20, 1972, and pursuant to Section 316(a) of the Communications Act of 1934, as amended, the outstanding license held by Lake Cumberland Broadcasters for Station WJRS–FM, Jamestown, Kentucky, IS MODIFIED to specify operation on Channel 285A in lieu of Channel 276A subject to the following conditions:

(a) The licensee shall inform the Commission in writing by no later than November 20, 1972, of its acceptance of this modification.

(b) The licensee shall submit to the Commission by December 11, 1972, all necessary information complying with the applicable technical rules for modification of authorization to cover the operation of Station WJRS–FM on Channel 285A at Jamestown, Kentucky.

(c) The licensee may continue to operate on Channel 276A under its outstanding authorization until it is ready to operate on the new frequency or until 45 days after a construction permit has been granted for Channel 276A at Greensburg, Kentucky. Within 30 days of commencing operation on Channel 285A, the licensee shall submit measurement data of the sort normally required in an application for an FM broadcast station license.

(d) Lake Cumberland Broadcasters shall not commence operation on Channel 285A until the Commission specifically authorizes it to do so.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

109-012—72——4

F.C.C. 72R–295

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
LEROY GARRETT, TRADING AS GARRETT BROADCASTING SERVICE (WEUP), HUNTSVILLE, ALA.	Docket No. 19258 File No. BP–18295
WRBN, INC. (WRBN), WARNER ROBINS, GA. For Construction Permits	Docket No. 19259 File No. BP–18409

MEMORANUDM OPINION AND ORDER

(Adopted October 13, 1972; Released October 16, 1972)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. Presently before the Review Board is a motion to affirm grant, filed July 10, 1972, by WRBN, Inc. (WRBN).[1]

2. This proceeding involves the mutually exclusive applications of Garrett Broadcasting Service (Garrett), which operates Station WEUP at Huntsville, Alabama, and WRBN which operates Station WRBN at Warner Robins, Georgia. Both applicants request authority to change their existing facilities from daytime to full-time operation on 1600 kHz. The Commission by Memorandum Opinion and Order, FCC 71–617, 36 FR 11881, published June 22, 1971, found the applications to be mutually exclusive and designated them for consolidated hearing because a grant of Garrett's application would raise the WRBN RSS[2] nighttime limitation to such an extent that WRBN would fail to serve a significant portion of the city of Warner Robins at night. The Commission also specified, *inter alia*, 5 mv/m coverage (Rules 73.30(c) and 73.188(b)(2)) and Rule 73.188(b)(1)[3] issues against Garrett. The Review Board, by Memorandum Opinion and Order, 31 FCC 2d 873, 22 RR 2d 1038 (1971), later added two issues against WRBN also relating to its compliance with Commission Rules 73.30(c) and 73.188(b)(1). In an Initial Decision, FCC 72D–28, released May 2, 1972, the Administrative Law Judge recommends grant of WRBN's application, concluding that the proposal complies with the requirement of Rule 73.188(b)(1) and that a waiver of Rule 73.30(c) is warranted. With respect to the Garrett application the Presiding Judge concluded that the proposal complies with Rule

[1] Other pleadings before the Review Board are: (a) opposition, filed July 17, 1972, by the Broadcast Bureau; (b) comments on the motion to affirm grant, filed July 18, 1972, by Garrett Broadcasting Service (WEUP); and (c) reply, filed August 10, 1972, by WRBN.

[2] RSS refers to the root sum square of interfering signals in accordance with Section 73.182(o) of the Commission's Rules. The Commission found that the Garrett application would raise the WRBN RSS nighttime limitation of 11.26 mv/m to 14.54 mv/m.

[3] Rule 73.30(c) states, "The transmitter of each standard broadcast station shall be so located that primary service is delivered to the borough or city in which the main studio is located in accordance with the rules and regulations of this subpart." Rule 73.188(b)(1) states, "A minimum field intensity of 25 to 50 mv/m will be obtained over the business and factory areas of the city." Rule 73.188(b)(2) states, "A minimum field intensity of 5 to 10 mv/m will be obtained over the most distant residential section."

73.188(b)(1), but that since it would provide primary service to only 73% of the population and 49% of the area of its proposed city of license, it does not comply with Rule 73.30(c). The Presiding Judge further concluded that a waiver of the Rule was not warranted because, *inter alia*, of the effect of a grant of Garrett's application on WRBN's proposed operation.

3. WRBN initially contends that its application should be severed and granted because the finalization of its grant would not affect consideration of WEUP's exceptions. In support of this contention, movant notes that Garrett's exceptions to the Initial Decision do not challenge grant of WRBN's application, and that the Bureau, which proposed to the Presiding Judge that WRBN's application be granted, has filed no exceptions to the Initial Decision. As further justification movant alleges that because the area proposed to be served by WRBN is currently without any primary AM service, the public interest would be served by the requested severance and grant, citing *James J. B. Scanlon*, 7 FCC 2d 483, 9 RR 2d 887 (1967); and *Columbia Broadcasting System, Inc. (WCAU)*, 10 FCC 2d 795, 11 RR 2d 892 (1967). Finally, WRBN states that it will agree to accept the additional interference which it would receive from the Garrett proposal were its application to be granted.

4. The Broadcast Bureau, in opposition, notes that the WRBN proposal, if granted simultaneously with Garrett's proposal, would encompass only 81.4% of the population of Warner Robins. The Bureau asserts that 81.4% coverage would be an unwarranted deviation from the Commission requirements designed to assure optimum broadcast service to the public. In addition, the Bureau states that it has opposed and will continue to oppose a grant of Garrett's application. However, the Bureau believes that if severance and grant were allowed, Garrett's exceptions would be rendered moot, thus severely prejudicing the Board's consideration of the merits of those exceptions. Garrett states that it has no objection to the Board's favorable consideration of movant's request if the Board agrees that the applications are not mutually exclusive and that a grant of the motion "will not prejudice any action that might be taken on the Garrett application." In reply, WRBN argues that the Bureau's position is inconsistent with its earlier position in its proposed findings where the Bureau recommended that WRBN's application be granted. Moreover, argues WRBN, the Bureau's position is inconsistent with the position taken by it in *Columbia Broadcasting System, Inc., supra*, because there the Bureau supported severance due to service to a substantial white area. Finally, WRBN contends that consideration of Garrett's exceptions would not be prejudiced by a grant of WRBN's application because Garrett argues that *both* applications should be granted.

5. The Review Board will deny movant's request for severance and grant. It is well established that such requests will be denied where an evaluation of the request "requires separate examination of pertinent portions of the hearing record and Initial Decision, and an examination of all the exceptions," absent some showing of a compelling public interest benefit. *Southern Radio and Television Co.*, FCC 64R-137, 2 RR 2d 101, 102 (1964). See also *Charles J. Lanphier*, FCC 60-1416, 20 RR 1077 (1960); *Alexandria Broadcasting Corporation (KXRA)*,

FCC 61–488, 21 RR 551 (1961); and *Greenwich Broadcasting Corporation*, FCC 63R–485, 1 RR 2d 560 (1963). Such an examination of the full record would be necessary here since a grant of WRBN's application could prejudice consideration of Garrett's application. In this regard it is important to note that the Presiding Judge found that, if Garrett's proposal were granted, coverage of the population of Warner Robins by the WRBN proposal would be reduced from 92.4% to 81.4%, and the Bureau takes the position that such a percentage would represent an "unwarranted deviation" from Commission requirements. Further, while the fact that Warner Robins would provide service to substantial areas and populations which do not now receive primary AM service is significant, a minimum of three aural services (in this instance all FM)[4] are available in any one portion of the proposed nighttime primary service area and therefore the proposed service is not of such compelling significance to provide adequate justification for departure from normal procedures. Finally, the Board believes that the cases relied upon by movant are clearly distinguishable. In both *Scanlon* and *Columbia Broadcasting System, Inc., supra*, no other party to the proceeding had opposed the requested severance and, in those cases, a determination that a severance and grant could be made without prejudice to the remaining applicants was readily apparent without the necessity of a full examination of the complete record.

6. Accordingly, IT IS ORDERED, That the motion to affirm grant, filed July 10, 1972, by WRBN, Inc, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[4] In this regard it is important to note the relatively recent trend of Commission policy to consider both AM and FM services as component parts of a total aural service. See *Cherokee Broadcasting Co.*, 17 FCC 2d 121, 15 RR 2d 1205 (1969); *Report and Order in Docket No. 15084*, 2 RR 2d 1658 (1964); and *Babcom, Inc.*, 24 FCC 2d 690, 19 RR 2d 883 (1970), petition for reconsideration denied 27 FCC 2d 437, 21 RR 2d 6 (1971).

F.C.C. 72-789

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
ITT WORLD COMMUNICATIONS, INC.
Interconnection of ITT Telex Network With the Hawaiian Datelex Network To Provide Telex Service Between Hawaii and Overseas Points

MEMORANDUM OPINION AND ORDER

(Adopted September 7, 1972; Released September 8, 1972)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND H. REX LEE ABSENT.

1. The Commission has before it for consideration: (a) an amendment filed on August 1, 1972 by ITT World Communications Inc. (ITT) to its Tariff F.C.C. No. 12 to become effective September 11, 1972, providing for interconnection between DATATEL subscribers of the Hawaiian Telephone Company (HTC) and ITT's office in Honolulu for the purpose of offering telex service between points on HTC's system and the various overseas points served by ITT;[1] (b) a Petition to Reject the filing filed jointly on August 18, 1972, by The Western Union Telegraph Company (WU) and Western Union of Hawaii (WUH); and (c) a Reply to the Petition for Rejection filed by ITT on August 28, 1972.

2. In its transmittal letter, ITT stated that the filing was in the public interest because it offers to HTC's DATATEL subscribers access to its worldwide telex network, and that the level of rates would be consistent with the recent tariff filing of another international record carrier for telex service to and from places on the island of Hawaii.[2] At present, ITT offers telex service from and to the State of Hawaii only to customers located in or within ten miles of Honolulu. The applicable rates would be the same as those to or from Honolulu.

3. In their Petition for Rejection, WU and WUH allege that the filing should be rejected because it is premature in light of our *Inquiry into the Policy to be Followed in Future Authorization of Overseas Dataphone Service*, Docket No. 19558, released July 31, 1972, and that the subject matter be considered in connection with that proceeding. The purpose of the inquiry is to secure comments on the many factors to be considered in determining whether or not dataphone, or a similar

[1] Specifically, 4th Revised Title Page, 6th Revised Page 3, and 5th Revised Page 5A. These revisions were originally scheduled to become effective September 1, 1972 but were voluntarily extended by ITT under authority of Special Permission No. 6616.

[2] Effective August 12, 1972, Western Union International (WUI) amended its telex tariff to provide for the acceptance and delivery of telex calls at Hilo on the island of Hawaii.

service, should be authorized to overseas points. The protestants claim that ITT's proposal should be considered in Docket No. 19558 and not separately; that to consider it separately would be in direct conflict with "the Commission's recently stated opinion that it doesn't believe the processing of individual applications would be a satisfactory method of arriving at policy determinations in this matter (FCC 72-673, par. 8, emphasis added)." They also assert that authority under Section 214 of the Act is a prerequisite to the proposed interconnection alleging that the proposed DATATEL/telex arrangement is a new service and not the type of service intended to be included in ITT's present authorizations. They further assert that no details are given as to how this arrangement would be established or as to the costs associated with such service and that it would be inappropriate to waive Section 61.38 of our Rules as requested by ITT.[3] Protestants also state that the filing is premature because there is no agreement between ITT and WU which would provide for WU subscribers on the mainland to either send or receive DATATEL/telex calls to or from Hawaii. They allege that the present agreement is limited to providing service between international telex subscribers and domestic telex subscribers, and that although the agreement states that with respect to matters not specifically covered it, the administration of it shall be by mutual agreement, there is no mutual agreement which would enable ITT to interconnect HTC's DATATEL subscribers to WU's telex subscribers.

4. In its reply, ITT states that the protestant's pleading is based on a single faulty premise, namely, that ITT is proposing to offer dataphone service to overseas points. It points out that the interconnection arrangement only will enable HTC's DATATEL subscribers to send or receive overseas telex calls at 50 baud speed, without use of voice,[4] using the same teleprinters they now use in placing DATELEX calls within the State of Hawaii. It will provide benefits in cost savings and office space by having one teleprinter perform the work of two. ITT advises that its telex network in Honolulu interfaces with the DATELEX network on an automatic basis in the same manner it interfaces with WU's TWX system on the mainland, and that the transmission speed on calls to or from DATATEL subscribers would be converted by ITT from 110 baud to 50 baud on outgoing calls, and vice versa on incoming calls. ITT therefore contends that the proposed service is not within the scope of the dataphone inquiry. ITT also contends that authority under Section 214 is not required, that waiver of Section 61.38 is appropriate, and that DATATEL's subscribers are "international telex subscribers" within the meaning of the agreement between WU and ITT referred to above.

5. We believe that the objections are without merit. We do not see how the dataphone inquiry has any bearing in this matter, which involves the transmission of telex calls for which ITT provides 50 baud channels on the overseas portion which cannot conceivably be used for voice at the present state of the art. Additional authority pursuant

[3] ITT has requested a waiver of Section 61.38 and has stated in its transmittal letter that there will be only nominal cost to establish the physical connection and that the net effect on its telex service is expected to be small due to the relatively few additional subscribers anticipated.

[4] DATATEL printers permit telephone coordination before and after the message is sent.

to Section 214 is not necessary and WU has not offered any support for its position in this respect. ITT has specific authority to provide telex service between Hawaii and the overseas points it serves, and it is not exceeding this authority in making arrangements to serve other telex users at points in Hawaii other than Honolulu. The proposed interconnection is similar to the arrangement between the international record carriers and Western Union and the Puerto Rico Communications Authority, wherein the latter originate and terminate telex calls in points not served by the international record carriers. With respect to the waiver of Section 61.38, we feel that such action would be appropriate in view of the long-established policy of the record carriers to apply the same charge at hinterland points for telex calls that are applicable at the gateways. Thus the rate for telex calls to or from the continental United States is the same regardless of what point it originates or terminates. The same situation prevails in Puerto Rico. Also, when WUI was given authority to extend telex service to Hilo, Hawaii, the grant was in part predicated on the fact that the rates to and from Hilo would be the same as Honolulu.

6. In view of the foregoing, we are of the opinion that the Petition for Rejection filed by WU and WU-Hawaii should be denied and the tariff allowed to become effective.

Accordingly, IT IS ORDERED, That the Petition to Reject by WU and WU-Hawaii in the above-referenced matter is hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-878

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of JACK STRAW MEMORIAL FOUNDATION, RADIO STATION KRAB(FM), SEATTLE, WASH. For a Construction Permit	File No. BPH-5518

MEMORANDUM OPINION AND ORDER

(Adopted October 5, 1972; Released October 13, 1972)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND REID ABSENT.

1. The Commission has for consideration: (a) a joint "Motion for Stay" and petition for reconsideration filed on behalf of several land mobile and maritime mobile licensees (petitioners),[1] and a petition for reconsideration filed on behalf of the Western Washington Cooperative Interference Committee (WWCIC), all of which are directed against Commission action of June 7, 1972, granting the above-captioned application; and (b) opposition and reply pleadings.

2. By Memorandum Opinion and Order of June 7, 1972, we granted the application of Jack Straw Memorial Foundation (KRAB) for a construction permit to change its transmitter location to Cougar Mountain, imposed a condition to minimize interference, if any, to two-way radio receiving equipment located on the mountain, and denied a petition to deny the application which had been filed by the petitioners on the ground that they had not made specific allegations of fact sufficient to show that a grant of the application would be prima facie inconsistent with the public interest. *Jack Straw Memorial Foundation*, 35 FCC 2d 397 (1972).

3. The motion to stay the effectiveness of this action is being considered concurrently with the petitioners' request for reconsideration since both pleadings raise substantially the same issues, in addition to which the stay request fails to establish a prima facie case of success on the merits and does not show irreparable injury to the petitioners or the public resulting from our joint disposition of the pleadings.

4. The petitioners failed in their initial effort to allege facts with specificity to sufficiently support their contention that the proximity of KRAB's proposed transmitter location to their receivers would result in desensitization of the receivers, regardless of the respective frequencies involved.[2] Apparently still not being able to provide ad-

[1] The petitioners are Glacier Sand and Gravel Co., Mid Mountain Contractors, Inc., Washington Natural Gas Co., Tug Communications, Inc., and Associated Sand & Gravel Company, Inc.

[2] We noted that the procedures contained in section 1.70 of the rules are not applicable to the Cougar Mountain site since government lands are not involved. In accordance with section 309(d) of the Communications Act, however, a party objecting to a grant of an application by alleging potential proximity interference cannot substitute general and conclusionary allegations for relevant technical data and an engineering analysis sufficient for us to determine whether a grant of the application would be prima facie inconsistent with the public interest.

ditional and meaningful data in this regard, the petitioners now allege, for the first time and on reconsideration, that KRAB's proposed operation will result in harmful interference caused by discrete intermodulation products. The petitioners have not attempted to explain why their alleged basis for potential interference problems and the nature of the data presented in support thereof were not submitted by them prior to our action on their initial petition, as they apparently could have been. In any event, on the basis of the information now provided, we find that the petitioners have not adequately demonstrated that intermodulation interference will occur, or, if it does, that it will be of such nature as to warrant reconsideration of our prior action.

5. The information submitted consists primarily of an engineering report based on a computer identification of intermodulation products of Cougar Mountain transmitter frequencies (including that of KRAB) to their third harmonics, with such frequencies being considered in a three-way mix, of which at least one frequency was that of an FM broadcast transmitter and the other two were any of the other transmitter frequencies on the mountain.[3] These intermodulation products were then compared against the two-way radio receivers on the mountain. The conclusions drawn from this study were that there are 262 discrete intermodulation products to which one or more of the six existing FM broadcast stations contribute as an energy source, that KRAB's proposed operation would add 45 such products, that KRAB's contribution would thus result in a 17.2 percent increase (45/262) in the number of products produced, and that an increase of this magnitude would "constitute a substantial increased impairment of the two-way services." Petitioners further assert that such intermodulation products would fall within receiver pass bands and could not be filtered out without eliminating wanted signals and that the number of intermodulation products may be expected to rise by a factor of 20 if each two-way and FM broadcast transmitter is assumed to be fully modulated whenever it enters a three-way mix.

6. A study of this nature, while interesting from an academic standpoint, is of little value in predicting with any degree of accuracy whether, in fact, interference will occur which will disrupt the functioning of the two-way radio receivers on the mountain. As the engineering report states, "[t]here remains the question of whether each of these products would appear at sufficient amplitude to produce substantial interference." Considering factors, however, such as the number of exposed non-linear devices in the 58 transmitters and 46 receivers on the mountain, and the innumerable potentially or actually corroded interfaces in hardware of towers, guys, fences, buildings, etc., petitioners conclude that there is a "substantial probability" that all the intermodulation products would occur "at some amplitude between negligible and overwhelming." A conclusion that some of the anticipated intermodulation products would be of sufficient magnitude to cause harmful interference is, in our opinion, highly specula-

[3] The computer study produced intermodulation products based on up to fifth harmonics. However, for purposes of the report, only intermodulation products from transmitter carrier frequencies up to their third harmonics, and only those which fell in the pass bands of existing receivers, were considered. According to the petitioners, many variables, such as transmitter spurious emanations resulting from intermodulation during multiplication in exciters, were likewise not considered.

tive, simplistic and not supported by the data submitted. The petitioners indicate that existing FM broadcast stations presently contribute to 262 intermodulation products. No mention is made, however, of any existing significant interference problems arising therefrom. The petitioners, in not attempting to support their conclusions with meaningful and verifiable facts obtained from their actual field experience, indicate to us that disruptive interference problems do not presently exist on the mountain.[4] They have not made a convincing showing that the addition of KRAB's facilities will materially alter the situation [5] or that corrective measures could not be taken in the event harmful interference does occur.

7. We recognize that the many variables involved in situations of this type create the *possibility* of interference problems and believe that the most practical and equitable manner of dealing with the instant situation, in the absence of information sufficiently showing that a grant of KRAB's application would be prima facie inconsistent with the public interest, is to grant the application subject to a condition providing for tests under actual conditions. KRAB is on notice that if serious interference problems are encountered, either from intermodulation products or in the form of receiver desensitization, corrective measures will have to be taken, even if this will mean relocating to yet another site. KRAB's application has been granted subject to a condition providing for operation at $\frac{1}{10}$ power "until all substantial problems of interference to two-way receivers are overcome." The condition further sets forth our expectation that all interested parties will cooperate fully and in good faith in seeking to prevent interference and in resolving interference problems, should they occur. Petitioners claim that the condition is vague in that the term "substantial" is not defined and that the parties may differ in their concept of what constitutes full cooperation. They further contend that by conditioning the grant on KRAB's —cooperation with WWCIC in "suggested installation" of facilities, we have placed the burden of eliminating or mitigating interference on a small cooperative committee with limited experience in broadcast engineering. With respect to this latter point, KRAB obviously has the burden of constructing its facilities in a way that interference can be prevented or minimized, and we have merely afforded WWCIC an opportunity to offer any suggestions it may have in the spirit of cooperation and for the benefit of all parties involved. We recognize, however, that if problems do occur, the parties may differ with respect to their interpretations of the severity of the problems and the measures which should be taken to minimize them. If the parties prove incapable of resolving such

[4] In its opposition pleading, KRAB asserts that the only known problems of intermodulation on Cougar Mountain have come about because of the 5 MHz spacing between KETO–FM and KYAC–FM; that this causes problems due to inadequate receiver front-end performance in some UHF receivers used with repeater transmitters spaced 5 MHz lower; and that KRAB is not 5 MHz spaced from any other Seattle FM broadcast transmitter. In reply, the petitioners merely dispute KRAB's claim that intermodulation problems can be attributed to inadequate receiver front-end performance.

[5] Both the petitioners and WWCIC are concerned that two other broadcast stations in the Seattle area have shown an interest in relocating their transmitting equipment to the KRAB site and fear a future compounding of interference problems. In the event such applications are submitted at some future date, the petitioners and WWCIC would be in a position to realistically and verifiably assess the impact of KRAB's operation in relation to the other facilities on the mountain and would have the opportunity to oppose such applications if they considered an opposition to be warranted.

matters among themselves, we would expect them to submit the matter to the Commission for our consideration and appropriate action.

8. WWCIC, in its petition for reconsideration, indicates that interference problems can occur in closely spaced systems, that such problems cannot be accurately predicted, that measurements and calculations usually do not yield practical answers and that an empirical approach and field experience must usually be relied upon. In this connection, neither WWCIC nor the petitioners have presented any data or analysis with any degree of specificity with respect to interference problems which have occurred on Cougar Mountain over the years. There presently are six FM broadcast stations with their transmitting equipment on the mountain, one of which (KYAC–FM) is located in the area designated by WWCIC as the "receiving area." KYAC–FM's transmitting equipment is thus located near the proposed KRAB site, in proximity to two-way receiver equipment, without any apparent adverse effects on the operation of the receivers, either in the form of receiver desensitization or from intermodulation products. It also appears that some receiver equipment is located in the area designated by WWCIC as the "transmitting area" and that neither WWCIC nor petitioners have come forth with any data, either empirical in nature or otherwise, indicating that severe problems have been encountered therefrom. The only reference WWCIC makes to intermodulation problems is that intermodulation was occurring several years ago among two-way 460 MHz transmitters; that in some cases FM broadcast transmitters were also involved; that interference resulted to reception of wanted signals by the two-way stations; that moving a number of the 460 MHz transmitters to the "receiving area" corrected this situation and no adverse effects have been observed. Although 460 MHz transmitters are thus located in the "receiving area" without adverse effects, WWCIC contends that it "believes" that the presence of KRAB in the "receiving area," at an effective radiated power of 45 kW, will be "a vastly different thing." Again, no supporting data or analysis is given.

9. In view of all the foregoing factors, we conclude that petitioners' allegations and supporting data concerning intermodulation interference are not timely filed; that they are insufficient to show that a grant of KRAB's application, subject to the condition imposed, is prima facie inconsistent with the public interest; and that both the petitioners and WWCIC have failed to show that any other public interest factors exist which would warrant reconsideration of our prior action.

10. Accordingly, IT IS ORDERED, That petitioners' motion for stay and petition for reconsideration, and WWCIC's petition for reconsideration, ARE DENIED, and our prior grant of the above-captioned application IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R-284

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of JEFFERSON STANDARD BROADCASTING Co. (WBTV) CHARLOTTE, N.C. For Construction Permit	Docket No. 18880 File No. BPCT-4168

ORDER

(Adopted September 29, 1972; Released October 3, 1972)

BY THE REVIEW BOARD:

1. The Review Board having under consideration the petition for leave to amend to update application pursuant to Section 1.65 of the Rules filed on September 22, 1971, by Jefferson Standard Broadcasting Company;

2. IT APPEARING, That no objections to acceptance of the amendment have been filed within the time allowed therefor;

3. IT IS ORDERED, That the petition for leave to amend IS GRANTED and the amendment IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R-277

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
STUART K. LANKFORD, GEORGE R. LANKFORD, AND RAY J. LANKFORD D.B.A. LANKFORD BROADCASTING CO., NEW ALBANY, IND.	Docket No. 18637 File No. BPH-6427
RADIO 900, INC., LOUISVILLE, KY.	Docket No. 18638
For Construction Permits	File No. BPH-6429

ORDER

(Adopted September 29, 1972; Released October 3, 1972)

BY THE REVIEW BOARD:

1. The Review Board having under consideration the petition to reopen the record, for leave to amend, and to reclose the record for the purpose of updating application, filed on June 12, 1972 and August 28, 1972;

2. IT APPEARING, That no objection to acceptance to the amendments have been filed within the time allowed therefor;

3. IT IS ORDERED, That the above petitions for leave to amend ARE GRANTED and the amendments therein ARE ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R-280

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
MEDIA, INC., YOUNGSTOWN, OHIO	Docket No. 18768 File No. BP-17435
JUD, INC., ELLWOOD CITY, PA.	Docket No. 18769
For Construction Permits	File No. BP-17749

ORDER

(Adopted September 29, 1972; Released October 3, 1972)

BY THE REVIEW BOARD:

1. The Review Board having under consideration petitions for leave to amend application pursuant to Section 1.65 of the Rules, filed on March 9, 1972, September 11, 1972, and June 29, 1972, by Jud, Incorporated;

2. IT APPEARING, That no objections to acceptance of the amendments have been filed within the time allowed therefor;

3. IT IS ORDERED, That the above petitions for leave to amend ARE GRANTED and the amendments therein ARE ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

F.C.C. 72-857

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of THE MEREDITH CORP., OMAHA, NEBR. For Renewal of Licenses of Stations WOW, WOW-FM,* and WOW-TV, Omaha, Nebr.	File Nos. BR-686, BRH-1210, BRCT-39.

MEMORANDUM OPINION AND ORDER

(Adopted September 27, 1972; Released October 4, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT.

1. The Commission has before it for consideration: (1) the above-captioned applications for renewal of licenses of Stations WOW, WOW-FM and WOW-TV, Omaha, Nebraska, filed by the Meredith Corporation (licensee); (2) a Petition to Deny the renewal applications of these stations filed by Mr. Albert J. Treutler (petitioner); (3) an Opposition to the Petition filed by the licensee; and, (4) a Reply to the Opposition filed by the petitioner.

2. The Meredith Corporation timely filed its applications for renewal of licenses for Stations WOW, WOW-FM and WOW-TV on March 1, 1971. Thereafter, on April 6, 1971, Mr. Albert Treutler of Omaha filed a Petition to Deny the renewal applications of these stations. Briefly, petitioner alleges that the licensee: (a) failed to complete properly FCC Form 303; (b) failed to conduct an adequate survey of the Omaha Community including community leaders and members of the general public; (c) destroyed petitioner's political aspirations by slanted news coverage of petitioner's campaign; (d) violated the fairness doctrine; and, (e) broadcast and promoted material which appealed to the prurient interests of the listening audience. Petitioner requests that the Commission either deny the license renewals for the above-captioned stations, or order the licensee to pay petitioner $10,000 in actual damages and $35,000 in punative damages for plagerism and the unauthorized broadcast of copyright material.

FCC FORM 303

3. Pursuant to FCC Form 303, the renewal application form, applicants for renewal of broadcast licenses are required to report suits in the federal courts involving, "the monopolization, or an attempt to monopolize radio communications directly or indirectly through the

*The licensee was granted change of call letters from WOW-FM to KFMX(FM) effective December 1, 1971. Since the call letters were WOW-FM at the time Mr. Treutler filed his Petition to Deny, the call letters WOW-FM will be used throughout this Memorandum Opinion and Order for purpose of clarity.

control of the manufacture or sale of radio apparatus * * * or by using unfair methods of competition." Petitioner alleges that licensee improperly completed its renewal applications by neglecting to state that petitioner had brought suit against licensee in the federal courts for libel. However, since petitioner's suit against licensee was a suit in libel, and not monopolization or unfair competition, we find that the licensee was under no obligation to report petitioner's suit in libel on its applications for renewal of licenses for WOW, WOW–FM and WOW–TV.

COMMUNITY LEADER SURVEY

4. Petitioner next alleges that licensee conducted an inadequate community leader survey of the needs and interests of the Omaha community, in that the survey submitted by licensee is "so shallow and without depth it almost appears as an intentional attempt to mislead the Commission." Petitioner states that the survey did not include interviews with United States Senators or Congressmen, Omaha City Councilmen, policemen or members of the Republican or Democratic parties. In addition, according to petitioner, licensee neglected to interview a sufficient number of representatives of the following community groups: agriculture, education, business, church, women, civic and community, minority and charitable. Petitioner further alleges that licensee's survey raises questions concerning the good faith efforts made by licensee to ascertain the needs and interests of the Omaha community. In its Opposition, licensee states that petitioner's allegation with respect to its community survey is an effort to substitute his judgment for that of licensee in the selection of community leaders and members of the public. Licensee further states:

> Since it is clear that no licensee can contact every single community leader and every single member of the public it is relatively easy for a party such as Mr. Treutler to criticize a community survey simply by mentioning some parties that were not included in the survey.

5. An examination of licensee's survey of community leaders discloses that licensee interviewed 112 community leaders and did, in fact, interview representatives of many of the groups mentioned in petitioner's pleading. In addition to numerous other consultations, licensee consulted with 13 government leaders, 8 church leaders, 11 agricultural leaders, 12 educational leaders, 6 business leaders, 13 minority group members, 7 representatives from women's groups and 8 welfare group representatives. In our *Public Notice re: Ascertainment of Community Needs by Broadcast Applicants*, FCC 68–847, 13 RR 2d 1903 (1968), and more recently in our *Primer on Ascertainment of Community Problems*, 27 FCC 2d 650 (1971), we indicated that broadcast applicants—including renewal applicants—are expected to provide full information on their awareness of and responsiveness to local community problems through consultations with a cross-section of community leaders. In short, in view of the number and character of the persons interviewed, we are satisfied that the licensee has ascertained the problems of its service area from a representative cross-section of community leaders in that area.

SURVEY OF THE GENERAL PUBLIC

6. Petitioner also alleges that licensee's "Cross Interest" survey, a mail survey sent to a cross-section of licensee's service area, is invalid due to the fact that licensee offered monetary incentives to those who returned the questionnaire. According to petitioner, "It has long been an accepted fact among professional surveyors that payment or incentives for answers tend to supply misleading or inaccurate survey results." Petitioner also states that licensee placed an almost total dependence on the mail survey, instead of personal interviews as required by the Commission. Licensee, in its renewal application, states that the purpose of the "Cross Interest" survey was to obtain detailed responses which would help to achieve four goals: (1) to examine the attitudes of those interviewed toward their local, individual communities, as well as toward the general viewing listening area; (2) to identify the problems of the community; (3) to provide a basis for program development for licensee's stations; and, (4) to obtain additional data and information not obtained from the community leader survey and the demographic report.[1] In order to accomplish this, licensee mailed 646 questionnaires in November of 1970 which provided stamped, self-addressed return envelopes and an incentive of 25¢. Three weeks later an additional mailing was made to non-respondents which contained a one dollar bill as an incentive. By December 1970 the licensee had received 451 completed questionnaires, or 70% of the original 646 which were mailed. Furthermore, telephone interviews were then conducted among a random sample of those who had not responded by mail and 73 completed telephone interviews brought the return rate to 81%. In addition, licensee learned that, although the response rate was 81%, the response rate in ghetto areas was only 65%. Licensee then conducted personal interviews among ghetto residents which resulted in 530 completed interviews out of the 646 originally mailed.

7. As a result of this "Cross Interest" survey, licensee submitted a detailed analysis consisting of approximately 70 pages, including an extensive analysis of community problems and needs. With respect to petitioner's allegation that licensee's survey is invalid due to the monetary incentives offered by licensee to respondents, licensee denies this allegation and states that its community survey was scientifically valid. In our *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971), we stated that mail surveys where respondents are requested to voluntarily return a questionnaire by mail produce a strong "cooperation bias" that renders the information gathered by such a survey almost meaningless. However, the "voluntary return" referred to in the *Primer* refers to a mail survey where a licensee relies solely on the respondent's efforts to return the completed survey without any further efforts on the part of the licensee to see that the survey is completed and returned. This is not the case here. Licensee, after mailing the original questionnaires, made extensive efforts to see that the respondents returned those ques-

[1] In selecting proposed respondents for the "Cross Interest" survey, licensee first selected a sample of counties in the stations' service area using controls based on population density. Licensee then selected the names and addresses of respondents at random from telephone directories in the counties selected.

tionnaires. Licensee's efforts included telephone calls and personal interviews. In addition, we fail to see how a monetary incentive could prejudice or bias a random survey of the needs, interests and problems of the Omaha community. Our *Primer* requires, in addition to a survey of community leaders, a survey of a random sample of the general public which should be designed to further ascertain community problems which may not have been revealed by consultations with community leaders. Based on the foregoing facts, it is clear that the licensee has complied with our requirements and, accordingly, we find that petitioner has failed to substantiate his position.

COVERAGE OF PETITIONER'S MAYORALTY CAMPAIGN

8. Petitioner next alleges that licensee destroyed his political aspirations through the use of secretive news acquisition, camera technique, editing, inference and innuendo. Petitioner states that he was a candidate for mayor; that licensee interviewed him for a television story during his campaign; that during this interview licensee's newsman questioned him concerning his ownership of the Ade Book Company; and that, when the interview was broadcast, licensee also included film segments and made comments regarding an advertisement for the book, "Parody of Marital Love, 12 Modern Positions", a book published and distributed by petitioner. The effect of this, according to petitioner, was to convey the illusion that petitioner was a peddler of obscene literature. Petitioner later brought suit against licensee in a federal court in Nebraska for libel. Although licensee was granted summary judgment, petitioner states that he intends to appeal the case.[2] With respect to this issue, licensee states:

> Treutler's other assertions growing out of the broadcast in which he was featured are involved in the appeal in Mr. Treutler's civil litigation and we think it sufficient to say that his rights, if any, are being asserted in court and the Commission need not involve itself in the dispute with him.

9. It is not clear from the foregoing facts whether petitioner is alleging that the licensee violated the Commission's personal attack rules or deliberately distorted or slanted WOW's news coverage of his campaign for mayor. Based upon our review of the transcript of WOW's interview with petitioner, however, it is clear that the licensee did not attack his honesty, integrity or character in violation of Section 73.124, 73.300 or 73.679 of the Commission's rules. Instead, the facts show that the licensee was attempting to make known to the public petitioner's affiliation with the Ade Book Company. The Commission, of course, will not inquire into licensee's news presentations for, obviously, if we were to do so such action would constitute an attempt by this agency to substitute its judgment of news values for those of the licensee. Furthermore, as we have consistently maintained, the Commission does not consider it appropriate to conduct inquiries regarding a licensee's news presentations unless there is extrinsic evidence of deliberate distortions or staging of the news. *Letter to ABC*, et al., 16 FCC 2d 650 (1969); *Hunger in America*, 20 FCC 2d

[2] By letter dated February 14, 1972, counsel for licensee informed the Commission that on February 1, 1972, the U.S. Court of Appeals for the Eighth Circuit affirmed the summary judgment against petitioner and in favor of the Meredith Corporation.

193 (1969). When we refer to cases involving extrinsic evidence, we do not mean the type of situation presented in this case where, as the facts show, the petitioner merely claims that the licensee's newsmen "proceeded to interrogate him about his personal and private business, a subject [he claims] in no way [was] relevant to his potential 'official conduct or ability' to serve in public office." In the absence of extrinsic evidence, we are of the opinion that no further action is warranted regarding this aspect of petitioner's complaint.

FAIRNESS DOCTRINE VIOLATIONS

10. Petitioner also claims that licensee used its broadcast facilities to propagandize its support of a local urban renewal issue. Petitioner alleges that licensee, on at least three occasions during the past renewal period, presented special programming which supported the urban renewal issue, slanted its coverage of the issue and made no efforts to present the other side of the issue. Petitioner also claims that licensee refused to recognize his advertising agency which attempted to purchase spot announcements on behalf of the Taxpayer's Union in opposition to the urban renewal issue. In reply, licensee states that it did not reject any material for the Taxpayer's Union but simply refused to recognize petitioner as an advertising agency. Licensee also states that petitioner's complaint, in substance, is based on the fact that he was not recognized as an advertising agent, who wished to receive a commission on advertising for the Union.

11. Briefly, the fairness doctrine requires a station which presents one side of a controversial issue of public importance to afford reasonable opportunity for the presentation of significant contrasting viewpoints on the issue in its overall programming, which may include news programs, interviews, discussions, debates, speeches and the like. It has been longstanding Commission policy to require fairness doctrine complainants to (a) specify the particular broadcast in which the controversial issue was presented, (b) state the position advocated in such broadcast, and (c) set forth reasonable grounds for concluding that the licensee in his overall programming has not attempted to present opposing views on the issue. Here the petitioner has made only a general allegation that the licensee has been unfair in its treatment of a local urban renewal issue. As we stated in our letter to *Allen C. Phelps and the Federation of Citizens Associations of the District of Columbia*, 21 FCC 2d 12 (Nov. 25, 1969), "[a]bsent detailed and specific evidence of failure to comply with the requirements of the fairness doctrine, it would be unreasonable to require licensees to disprove allegations such as those made here." In sum, where, as here, the complainant only makes general allegations of unfairness, it is not unreasonable that the burden be placed on the complainant to come forward with some evidence showing a basis for his complaint that a licensee has failed to meet the requirements of the fairness doctrine. Based upon our review of the foregoing facts, it is obvious that the petitioner has failed to do so here and, accordingly, we are unable to conclude that the licensee violated the fairness doctrine with respect to the urban renewal issue.

12. Likewise, we are unable to conclude that the licensee deliberately distorted or slanted its coverage of the urban renewal issue. Here, too, the allegations are general in nature, and since they are accompanied by no extrinsic evidence of deliberate distortions or slanting, they do not raise a substantial or material question of fact necessitating a hearing. *Letter to ABC, supra; Hunger in America, supra.*

LICENSEE'S PROGRAMMING

13. Finally, petitioner alleges that licensee has repeatedly "used promotion on their own behalf intended to appeal to prurient interests." Specifically, petitioner states that WOW–TV broadcast such provocative movies as "Splendor in the Grass", "The Love Nest" and "The Stripper" and that the copy printed in the local television guide, such as "titillating, tantalizing and erotic" have no other purpose than to appeal to the prurient interests of juveniles and adults alike. Section 326 of the Communications Act specifically prohibits the Commission from censoring broadcast matter; thus, the selection of specific program material is left to the discretion of the broadcast licensee. We have stated:

> Although the Commission must determine whether the total program service of broadcasters is reasonably responsive to the interests and needs of the public they serve, it may not condition the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or is not a good program. To do so would "lay a forbidden burden upon the exercise of liberty protected by the Constitution." *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 25 F.R. 7291 (1960) at 7293.

Although certain programs may be offensive to listeners or viewers, those offended do not have the right, through the Commission's licensing power, to remove such programming from the air. *Memorandum Opinion and Order: In re Pacifica Foundation*, FCC 64–43 (1964). We fail to see how language such as "titillating, tantalizing and erotic", employed by licensee in the promotion of motion pictures, can be characterized as having "no other purpose than appeal to the prurient interests of juveniles and adults" as alleged by petitioner. Moreover, although the broadcast of obscene, indecent or profane language is prohibited by federal statute (18 U.S.C. 1464), petitioner does not allege that such language was broadcast by WOW–TV. In light of the above, we find that petitioner has failed to submit any information which raises a question concerning WOW–TV's choice of program matter.

14. With respect to petitioner's request that the Commission order licensee to pay $10,000 in damages and $35,000 in punitive damages, neither the Communications Act of 1934, as amended, nor the Commission's Rules provide for the payment of damages to petitioners in proceedings involving Petitions to Deny. Accordingly, petitioner's request for damages IS DENIED.

15. In view of the foregoing, IT IS ORDERED, That the Petition to Deny the license renewal application for Stations WOW, WOW–FM, and WOW–TV submitted by Albert Treutler IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

OPINION OF COMMISSIONER NICHOLAS JOHNSON, CONCURRING IN PART AND DISSENTING IN PART

A Mr. Albert Treutler brought a petition to deny the license renewals of stations WOW–TV, WOW (AM) and WOW–FM in Omaha, Nebraska. He charged that the Meredith Corporation, licensee of these three stations, (1) failed to complete properly the FCC's 303 form, (2) failed to conduct a survey of the needs of the Omaha community as required by the Commission, (3) destroyed petitioner's political aspirations by slanted news coverage of his mayoralty campaign, (4) broadcast material which appealed to prurient interests, and (5) violated the fairness doctrine.

The majority, perhaps feeling Mr. Treutler has not raised enough issues to warrant a hearing, dismisses the petition and grants the renewal. Although I concur in some of its language, I dissent from its ultimate action, and will discuss the fairness complaint as an illustration of our differences.

Mr. Treutler's fairness charge alleges that, on at least three occasions, the licensee presented programming in support of a local urban renewal issue. When the petitioner's advertising agency attempted to purchase spot announcements on behalf of the Taxpayers' Union—in opposition to the urban renewal issue—the licensee refused to sell such time. The licensee responds that it did not reject material from the Taxpayers' Union, but simply refused to recognize the petitioner as an advertising agency.

In the face of this obvious factual dispute, the majority dismisses the complaint, contending that it fails to provide "detailed and specific evidence" of a fairness doctrine violation.

What this Commission has never really learned is that it is *its* responsibility to enforce the Communications Act of 1934. In fact, the agency does virtually no enforcement whatsoever on its own motion (with the exception of certain technical matters). We make no effort—I repeat *no* effort—to monitor the programming of stations to see if they are running more commercials per hour than promised, if they are charging advertisers for commercials not broadcast, if they are running the news and public affairs programming promised—or if they are violating the fairness doctrine. We rely wholly upon public complaints. The argument is often made by FCC Commissioners or staff that an individual station must be doing a good job because we have received no complaints.

However questionable this administrative approach may be, let us accept it for the moment for purposes of argument. The question then arises, "OK, what does the Commission do when it *does* get a complaint?" The fact is that the Commission does little or nothing. The complainant may get a form letter. The only exceptions are those complainants who know to phrase their "letters" in the form that lawyers recognize as a "fairness complaint" or a "petition to deny license" or some other of the FCC's modern-day equivalents of the old common law rits—mysterious forms without which you could not get into an old English court. Such complainants do not get little or nothing. They get something much worse: hostile reaction and obtsructionism.

It is one thing for the government to look to citizens to help it enforce the law. It is quite another for government to put upon the citizen the full burden of performing every detail in precisely the right way.

In my judgment, the FCC has the responsibility to do at least *some* enforcement of the law on its own motion.

If, however, it is going to rely entirely upon citizens complaints, it then has at least a moral obligation to act upon them.

I think that we should appreciate a citizen's effort—that he is even entitled to a word of thanks. If his facts are not complete, if his compliance with our forms and procedures indicates that he has not had the services of a sophisticated member of the Federal Communications Bar Association who took his on-the-job training here at the Commission, then the responsibility shifts from his shoulders to those of the FCC.

If the Commission cannot even bring itself to *that* level of law enforcement, if it insists on maintaining a hostile adversary role toward the public it is supposed to serve, then the very least the law requires is that the ostracized citizen be treated fairly.

If the Commission *is* going to demand of a citizen a further factual basis for a fairness doctrine charge, it owes the complainant no less than a notification of that fact and an accompanying reasonable opportunity to amend his complaint. That was not done in this case.

When the problem involves a factual dispute, as in this case, it seems to me there is simply no alternative to a further inquiry by the FCC before dismissing the complainant out of hand.

However significant this case may be in its own right—and it is not an insubstantial matter—it takes on a far greater significance as an illustration of the much more general failing of the Commission to do its job in a manner even remotely befitting a public body.

F.C.C. 72-803

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
MID-FLORIDA TELEVISION CORP., ORLANDO, FLA.	Docket No. 11083
CENTRAL NINE CORP., ORLANDO, FLA.	File No. BPCT-1801
	Docket No. 17339
FLORIDA HEARTLAND TELEVISION, INC., ORLANDO, FLA.	File No. BPCT-3697
	Docket No. 17341
COMINT CORP., ORLANDO, FLA.	File No. BPCT-3737
	Docket No. 17342
TV 9, INC., ORLANDO, FLA.	File No. BPCT-3738
For Construction Permit for New Television Broadcast Station	Docket No. 17344
	File No. BPCT-3740

ORDER

(Adopted September 13, 1972; Released October 6, 1972)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND REID ABSENT; COMMISSIONERS JOHNSON, H. REX LEE AND WILEY CONCURRING IN THE RESULT; COMMISSIONER HOOKS CONCURRING AND ISSUING A STATEMENT.

1. The Commission has before it separate applications filed by TV 9, Inc., Comint Corporation, and Florida Heartland Television, Inc. on February 28, 1972, and by Central Nine Corporation on February 29, 1972, for review of the Review Board's Decision, FCC 72R-6, 33 FCC 2d 1, released January 13, 1972. Also before the Commission are: (a) an opposition to the applications for review, filed by Mid-Florida Television Corp. on March 24, 1972; (b) comments on the applications for review filed by the Chief of the Broadcast Bureau on March 24, 1972; (c) a reply filed by Florida Heartland Television, Inc. on April 5, 1972; (d) a reply filed by TV 9, Inc. on April 6, 1972; (e) a reply filed by Central Nine Corporation on April 7, 1972; (f) a petition for leave to amend, filed by Mid-Florida Television Corp. on May 16, 1972; and (g) a petition for leave to amend, filed by Comint Corporation on June 2, 1972.

2. The above referenced petitions for leave to amend are unopposed, and we have determined that acceptance of the amendments is consistent with the public interest.

3. Accordingly, IT IS ORDERED, That the petitions for leave to amend filed by Mid-Florida Television Corp. on May 16, 1972, and by Comint Corporation on June 2, 1972, ARE GRANTED and the accompanying amendments ARE ACCEPTED.

4. IT IS FURTHER ORDERED, That the applications for review filed by TV 9, Inc., Comint Corporation, and Florida Heartland Tele-

vision, Inc. on February 28, 1972, and by Central Nine Corporation on February 29, 1972, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

I do not intend to depose on the merits of denying the various applications for review.

As recently designated "Backlog Commissioner" I can only observe this case has been with us a long time (though I must say it is not altogether the fault of this Commission, inasmuch as there have been several court appeals involved).

Having come to this Commission some 18 years later than Mid-Florida, I would not disturb the ultimate determination of this matter.

My interest in this case is, simply, minority ownership of broadcast facilities. Although I do not believe the matter would have been of decisional significance in the instant case,[1] I believe that the Administrative Law Judge and the Review Board erred in conclusively finding that they were barred from awarding a preference to an applicant (assuming the applicant to be otherwise qualified) proposing substantial minority ownership. The development of this view is as follows.

First, Section 309(a) requires a Commission determination that the grant of a license for facilities will serve "the public interest, convenience and necessity."[2] Of the 697 commercial television stations operating in the country as of this date, *none* of those stations are owned by blacks. Whether or not this fact, ipso facto, reflects a "fair" and "equitable" distribution of television facilities in the eyes of the black community is beyond reasonable argument. See 47 U.S.C. § 307(b) which enjoins the Commission to provide "a fair, efficient and equitable distribution" of broadcast facilities to each of the States and communities. I could cite, *ad infinitum*, bitter denunciation of this deplorable situation by responsible parties both public and private. See generally, Efron, *What is Happening To Blacks in Broadcasting?*, TV Guide, August 19, 26, September 2 (1972), and particularly the final article in the triad series entitled "The License Battle Explodes."

But, in language as good as any, the United States Commission on Civil Rights has stated:

> The importance of this almost total absence of minorities from ownership of radio and television stations lies not only in the lost opportunities for minority entrepreneurship, but also in the significance of radio and television stations in shaping the Nation's attitudes of racial injustice. The National Advisory Committee on Civil Disorders, for example, reported that the communications media had "not communicated" to the majority of their audience—which is a majority group—a sense of degradation, misery and hopelessness of living in the ghetto. Greater representation in these important communications industries of people who are familiar with ghettos and barrios and who are sensitive to the feelings of hopelessness and frustration of those who live there and could contribute significantly to greater understanding on the part of majority white Americans.[3]

[1] In the instant case, two black stockholders held a combined 14.17% of an unsuccessful corporate applicant (Comint).
[2] Section 309(a) of the Communications Act, as amended, 47 U.S.C. § 309(a).
[3] Federal Civil Rights Effort: A Report of the United States Commission on Civil Rights, 280 (1971).

Against that backdrop of statutory obligations and the acknowledged inequities flowing from "whiter-than-white" television, I juxtapose this issue: in a comparative proceeding for new facilities, all other factors being equal, how should an applicant seeking to infuse minority ownership be regarded *vis à vis* its competition.

The Administrative Law Judge and the Review Board (as well as the Commission), in differentiating amongst several applicants for a facility, look for guidance to the Commission's *Policy Statement on Comparative Broadcast Hearings.*[4] The *Policy Statement* instructs that such matters as (1) full-time participation in station operation by owners, (2) proposed program service, (3) past broadcast record, (4) efficient use of the frequency, and (5) character should be considered.[5] The adjudicators in this case, in lengthy opinions, duly weighed these factors. Are the foregoing, however, exclusive and dispositive according to Commission standards? The Commission, itself has emphatically declared that they are not. Prefacing its *Policy Statement*, the Commission noted:

> The hearing and decision process is inherently complex and the subject does not lend itself to precise categorization or to the clear making of precedent. The various factors cannot be assigned absolute values, some factors may be present in some cases and not in others, and the differences between applicants with respect to each factor are almost infinitely variable.
>
> Furthermore, membership on the Commission is not static and the views of individual Commissioners on the importance of particular factors may change. For these and other reasons, the Commission is not bound to deal with all cases at all times as it has dealt in the past with some cases that seem comparable * * * and changes of viewpoint, if reasonable, are recognized as both inescapable and proper.[6] (Citations and footnotes omitted.)

In detailing above the comparative criteria, I intentionally omitted one criterion which the Commission underscored as critical in comparative cases, diversification of the control of the media of mass communications, which the Commission's *Policy Statement* describes as "* * * a factor of primary significance since * * * it constitutes a primary objective in the licensing scheme." 1 FCC 2d at 394.[7]

Flexibility in application of comparative criteria and diversification of control in the result are then the Polaris of the Commission's *Policy Statement* upon which adjudicatory parties must fix. There is no doubt that the Administrative Law Judge and the Review Board, with the latitude expressed in the *Policy Statement*, could have taken notice of the agitated yearnings of minority groups for inclusion in the broadcast media and applied the term "diversification" literally by awarding a preference in the face of a proposition novel to this Commission: black ownership of a television station. Here is how the ad-

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[4] 1 FCC 2d 393 (1965).

[5] *Id.* at 395, 397, 398, 399.

[6] *Policy Statement*, supra, at 393. Additionally, so as to leave little doubt that comparative criteria were not to be rigidly applied, the Commission ended its *Policy Statement* with the following replication of its posture:

> We pointed out at the outset that in the normal course there may be changes in the views of individuals as membership on the Commission changes or as Commissioners may come to view matters differently with the passage of time. Therefore, it may well be to emphasize that by this attempt to clarify our present policy and our views with respect to the various factors which are considered in comparative hearings, we do not intend to stultify the continuing process of reviewing our judgment on these matters. *Id.* at 399.

[7] See also, *Associated Press* v. *United States*, 326 U.S. 1, 20 where the Supreme Court stated that "* * * the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."

judicators translated the Communications Act, the *Policy Statement* and the multitude of decisions pivoting on the diversification issue.

In the Initial Decision,[8] the Administrative Law Judge concluded:

> 872. *Black Ownership.* The Commission has very recently recognized the importance of programming for Negro audiences:
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> * * * * * * *
>
> But there is no Commission or Review Board Ruling that Negro *ownership* of a station merits a preference presumably because it would be the only way Negro broadcast needs could be adequately met * * * [I]t cannot be *held* under the *Policy Statement*, which demands the practical application of attributes through station participation, that their (the two minority owners whose combined share amounted slightly over 14% of the entity) part ownership in Comint implies rendition of a service for a minority group which other applicants cannot provide. 33 FCC 2d at 267, 268. (Emphasis in original.)[9]

Could the Administrative Law Judge, based on the plastic *Policy Statement* language hereinbefore recited, earnestly glean any "demand" requirement that minority ownership be ignored unless some probative correlation between ownership and programming service to meet community needs is evident at hearing? The fact is that the Administrative Law Judge somehow fused (or confused) two distinctly stated criteria: diversification of control and service. Or maybe he also was injecting into the melange the integration of ownership and control issue. From his compressed treatment of the matter, and although the passage herein reproduced is styled "Black Ownership", I cannot determine that the three discrete criteria were separately and appropriately judged.

Comes then the Review Board and its Decision[10] holds, in the words of the Administrative Law Judge, that the "* * * Communications Act, like the Constitution is color blind"[11] and that it * * * believe[s] that, in a comparative broadcast proceeding, which is governed by the Commission's *Policy Statement*, supra, Black ownership cannot and should not be an independent, comparative factor * * *".[12] The Review Board further found:

> In view of all of the above, we conclude that an applicant in a comparative broadcast proceeding is not entitled to a preference for Black ownership, *per se*, but must show on the record that the Black ownership will result in a particular public interest benefit. We believe that this is the soundest approach. 33 FCC 2d at 18.[13]

Given the absolute paucity of blacks in television ownership, the fulminating black struggle to achieve within our American system, the federally regulated nature of broadcasting, the latitude provided by the *Policy Statement* and its mandate for diversification, I have no difficulty in finding black ownership, *per se*, would redound in a public interest benefit (not to say, a "particular" public interest benefit). The proposition—simply spelled BLACK MEDIA OWNERSHIP IS IN

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[8] FCC 70–20, released June, 1970, 33 FCC 2d 34 (1970).

[9] Again, two of the stockholders of one of the competing applicants, Comint, were black; one owned 7% and the other 7.17%, the latter being Vice President and director of the Corporation.

[10] FCC 72 R–6, released January 13, 1972, 33 FCC 2d 1 (1972).

[11] *Id.* at 17.

[12] *Id.* at 18.

[13] It is salient to note that in connection with this discussion, the Review Board, in a c.f. footnote, cites the *Citizens Communications Center* v. *F.C.C.* case, p. 6 *infra*; the implications of that case and the Review Board's awareness thereof is telling and this point is discussed further on.

THE PUBLIC INTEREST—is so self-evident in this day and age that I cannot endure agonizing a patient recrudescence of what the black struggle is all about,[14] nor will I list the decisions demonstrating the breadth with which the Commission has perceived the "public interest" when it has so desired.

Fortunately, other adjudicatory bodies have taken a different view of the existing imbalance against minority ownership. Thus, in *Citizens Communications Center* v. *F.C.C.*, 145 U.S. App. D.C. 32, 447 F 2d 1201 [22 R.R. 2d 2001] (1971), there was set aside the Commission's 1970 Renewal *Policy Statement* [15] which would have afforded a "preference" to incumbent licensees forced into comparative hearing. The Court of Appeals for the District of Columbia Circuit ordered the Commission to treat both existing licensees and challengers on an equal footing in accordance with Section 309 of the Communications Act and *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327 (1945). The Court, cognizant that freezing the *status quo* would forever exclude minorities and noting that the Communications Act "does not itself establish any specific licensing criteria," [16] footnoted in pertinent part:

> As new interest groups and hitherto silent minorities emerge in our society they should be given more stake in and chance to broadcast on our radio and television frequencies. According to the uncontested testimony of petitioners, no more than a dozen of the 7,500 broadcast licenses issued are owned by racial minorities. The effect of the 1970 *Policy Statement*, ruled illegal today, would certainly have been to perpetuate this dismaying situation. 145 U.S. App. D.C. at 44–45, 447 F 2d at 1212, fn. 36.[17]

On Petition for, *inter se*, Further Review, and in *Per Curiam* opinion of less than a page, the Court attached such significance to the point that it elevated it from the footnotes and in billboard language told the Commission:

> The essence of our opinion is that in cases involving a renewal application, the Communications Act and *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327 (1945), require a single full comparative hearing in which all applicants may develop, evidence and have their applications judged on all relevant criteria, *including plans for integration of minority groups into station operation. Citizens Communications Center* v. *F.C.C.*, U.S. App. D.C. , , F 2d , [24 R.R. 2d 2045, 2046] (1972). (Emphasis added.)

Three critical points about the relevancy of the *Citizens* case must be made: (1) the discussion involved comparative criteria to be applied to applicants in renewal proceedings—*not* in proceedings to

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[14] On the narrow matter of encouragement of minority ownership, the Department of Commerce has, pursuant to Executive Order 11458 of March 5, 1969, created a specific Office of Minority Business Enterprise, whose function is to "coordinate the plans, programs, and operations of the Federal Government which affect or may contribute to the establishment, preservation, and strengthening of minority business enterprise; promotes the mobilization of activities and resources of public and private state and local organizations and institutions towards growth of minority business enterprises and helps to coordinate the efforts of these groups with the Federal Government and establishes a focal point for the development, collection, summarization and public dissemination of information that will be helpful in understanding or promoting the establishment and successful operation of minority business enterprise." UNITED STATES GOVERNMENT ORGANIZATION MANUAL 1971/1972 at 282. If it is not avowed government policy to push for minority ownership, *per se*, somebody had better inform the Department of Commerce and the President. No doubt some would consider the establishment of OMBE a "preference" for minority capitalism; and they would be correct.

[15] *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants*, 22 F.C.C. 2d 424 (1970).

[16] *Citizens Communications Center, supra*, 145 U.S. App. D.C. at 38, 447 F. 2d at 1207.

[17] The quote is only slightly out of date as regards minority ownership. While there is still no black ownership of a television station, I am told that black ownership of radio stations may be approaching the astronomical figure of 20 out of nearly 7,000.

license a brand new facility; (2) the Court's language discussed minority ownership in station operation—not minority ownership and a to-be-accrued public interest benefit for which, in a prospective proceeding, palpable evidence could never be adduced; and, (3) the Court's original opinion was issued on June 11, 1971—after the rendering of the Initial Decision (released June 1, 1970) but previous to the Review Board Decision (released January 13, 1972). See f.n. 13, supra.

The first point is important because my advocacy in this statement is limited to a preference for minority applicants for a new facility where no license is lost and no existing owners displaced—black or white. Yet, the Court in *Citizens*, supra, urged comparative consideration of minority ownership inclusion even in renewal cases. While I thoroughly recognize that the heart of the *Citizens* holding—renewal proceedings—new facility proceedings—would technically require an extension of my *per se* minority preference for new facilities to renewals, reality constrains me to further recognize that an incumbent licensee has such a ponderous advantage anyhow (e.g., past programming "pluses", broadcast experience, finances, etc.) that an even application of the 1965 *Policy Statement* criteria still renders an existing licensee virtually impervious, absent a bad track record. And, we are not here to protect bad track records to begin with. *A fortiori*, when the Commission has a chance to ameliorate the all-white television (and almost all-white radio) situation without "taking" (in reality) from the entrenched majority, a preference for minority ownership is imperative.

The second point is important because in contending that substantial minority ownership, *per se*, is entitled to a preference, elementary logic dictates that (2) inasmuch as blacks have heretofore been totally excluded from television, it would be absurd to expect new black owners to initially run the day-to-day operation of a station and (b) persons with substantial equity in any enterprise will rush to learn about their property so as to protect their financial interest. Ownership experience cannot precede ownership.

The third point is important (although less than the first two) because the Review Board was fully aware of the thrust and import of the decision in *Citizens Communications Center*, supra, as well as the fact that *rigor mortis* did not afflict the *Policy Statement* and that proposed inclusion of minorities into the broadcasting infrastructure should receive favorable comparative consideration. To its credit, the Review Board in the instant case assigned "some credit" [18]—I do intend to debate on the hairsplitting esoteria that distinguish a "credit" from a "preference"—because one of the black stockholders proposed to participate two days a week to station operation: it did not assign—to use its paradoxical phrase—"integration credit" for a black physician-stockholder who could not, at this time, promise to actively devote time to station operation.[19]

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[18] Review Board Decision, 33 F.C.C. 2d 1, 18.

[19] I pause to observe that throughout, I have urged preference for applicants for substantial minority ownership—not token ownership. And, in passing, I would consider any equity in excess of 5% substantial; 1% is the ownership limit considered by the Commission with respect to corporate ownership of stations for purposes of application of its multiple ownership rules. See, e.g., 47 CFR § 73.35, Note 3.

To summarize: (1) there is presently no black television ownership, irrespective of causes; (2) the condition is intolerable; (3) the Communications Act requires equitable distribution of facilities in the public interest, convenience and necessity; (4) the Commission, as a discretionary matter, can assign reasonable policy preferences as between broadcast applicants with diversification preference occupying premier status; and (5) that in view of the dearth of minority ownership of broadcast facilities, a necessary and legitimate goal of real diversification and equitable distribution is the institution of a preference for those applicants proposing substantial minority ownership.[20]

If this Commission—and this government—are sincere (and I believe that they are) in their espousal of hopes of redressing past injustices, then I have projected one simple, painless step to turn this polarized society around. I am asking only for a "preference" to be computed along with the various other criteria; nowhere have I suggested that black ownership, standing alone, should be dispositive. If this device is criticized for being racist and artificial, it must be remembered that Blacks have been, for so many years, oppressed by racist and artificial devices that it may take other "artificial" measures to offset the prevailing conditions. If this device is adopted, I doubt that it will result in a mad scramble by applicants to secure token minority participation so as to avail themselves of this slight preferential edge.[21] But even if it does, and minority principals are actively sought, what is the demonstrable harm? And, should they achieve licensee status, interest and participation in this important and lucrative industry by minorities is bound to increase. The public "interest" benefit in licensing minorities is manifest: the situation has reached the point of public "necessity". 47 U.S.C. § 309(a). I ask my colleagues to support this position in the future, as a matter of policy, in an effort to make the public airwaves truly reflective of the public they serve. Pursuant to the Policy Statement's premonition, this Commissioner is injecting, at least, his individual view into the comparative matrix.[22]

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[20] Lest anyone think that this is a novel contention, the United States Commission on Civil Rights has urged:

"The FCC * * * should amend [its] procedures concerning issuances (sic) of licenses, which currently tend to protect the economic interests of existing licensees, to facilitate minority group entrance as entrepreneurs * * *". Civil Rights Commission Report, supra, fn. 3, at 361.

While it is not my policy to clobber existing licensees which have properly exercised their duties as "public trustees," *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367 (1969), in order to achieve a more representative minority mix, I share the Civil Rights Commission's zeal to "facilitate" minority media ownership.

[21] A policy of preference for "special" groups in comparative hearings is not *entirely* foreign to the Commission. For example, in 1947, a group calling itself (with Patton-like subtlety) Veterans Broadcasting Company, Inc., was awarded a license over a competing applicant, notwithstanding a Commission finding that both applicants were "legally, finally, and technically qualified". *Rochester Broadcasting Corp., et al.*, 11 F.C.C. 1256, 1267 (1947). With finesse approximating Veterans' nomenclature, the Commission noted in its conclusion: "Veterans Broadcasting Company, Inc. is owned by 38 stockholders, more than 95% of whom are veterans of World War II." 11 F.C.C. at 1267. Whither the nexus between that condition of status and qualification for broadcast ownership? Manifestly, in the souls of a well-intentioned Commission anxious for the advancement of a "special" group.

[22] See fn. 6, supra.

F.C.C. 72–783

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PETITION OF COLUMBIA BROADCASTING SYSTEM, INC. (CBS). For Waiver of Section 73.658(k)(1) of the Commission's Rules, With Respect to Regular Network News Following an Hour of Local News	)

MEMORANDUM OPINION AND ORDER

(Adopted August 29, 1972; Released September 6, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONERS H. REX LEE AND REID ABSENT; COMMISSIONER HOOKS NOT PARTICIPATING.

1. Columbia Broadcasting System, Inc. (CBS) has petitioned the Commission for continued waiver of Section 73.658(k)(1) of the Commission's Rules, the "prime time access rule", to permit affiliates and owned stations of the CBS television network in the top 50 markets to carry the CBS Evening News with Walter Cronkite or other news series in early prime time, if these are preceded by one hour of local news or public affairs programing, without the network news counting against the three hours of prime-time network programs permitted under the rule. Such waiver was granted for the 1971–72 season (the first under the rule) by Commission action of June 24, 1971 (FCC 71–673, 30 FCC 2d 577), and the CBS request is simply for a continuation of this for the coming year. The request has been supported by American Broadcasting Companies, Inc. (ABC) and the licensee of Station WMC–TV, Memphis, Tennessee, as to "top 50 market" stations generally. No opposition has been filed.[1]

2. As CBS points out, grant of waiver in these circumstances was foreshadowed in "footnote 36" of the May 1970 Report and Order adopting the rule, and again on reconsideration of it in August 1970 (Docket 12782, 23 FCC 2d 382, 395; 25 FCC 2d 318, 335). We noted in the former discussion that stations could, and several do, broadcast a half-hour of local news, then the network news, and then another half-hour of local news (at 6, 6:30 and 7 PM E.T. respectively), an arrangement which would still permit three hours of prime time network programs; but there appeared no public-interest reason to force such re-scheduling and "bracketing" if the licensee's judgment indi-

[1] The CBS "Request for Waivers", filed June 26, 1972, contained another request in addition to this one: for continuation of the waiver granted for 1971–72 for "one-time" network news and public affairs special programs. This request, which has been opposed, is not considered herein, but will be the subject of a decision to be issued shortly.

cated otherwise.[2] We stated that waiver would be granted on appropriate request. In granting the waiver for the 1971–72 year (June 1971) we noted this consideration, and granted a blanket waiver for the 1971–72 year. In taking that action, we granted waiver only for one year; but we also stated that we then knew of no circumstances which would warrant a change in policy in the future, particularly in view of the importance which the Commission attaches to in-depth coverage of local news and problems.

CONCLUSIONS

3. Upon consideration of the CBS request and other material mentioned, we are of the view that the same considerations still apply, and that continuation of the waiver to permit this practice should be granted. As in the earlier action, we are requiring stations to notify the Chief, Broadcast Bureau, before September 15, 1972, if they intend to operate under this waiver; and we are granting it only for the 1972–73 year.

4. Accordingly, IT IS ORDERED, that:

(1) The "Request for Waivers" filed by Columbia Broadcasting System, Inc., on June 26, 1972, IS GRANTED, with respect to the request covered herein; and

(2) Stations in markets subject to the provisions of Section 73.658 (k) of the Rules MAY PRESENT, during the first half hour of prime time (7 PM E.T. and P.T., 6 PM C.T. and M.T.), network news without having it count against the three hours of prime-time network programing permissible under that Section, provided that: (i) the full hour preceding the network news is devoted to local news or public affairs material originated by the station (except for commercial announcements or PSA's), and (ii) stations wishing to operate under the waiver so notify the Chief, Broadcast Bureau, by September 15, 1972. This waiver extends only through September 30, 1973.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[2] 23 stations are presenting network news on weekdays at 7 (or 6 C.T.) under this waiver, plus one more (Denver CBS) which would have to operate under waiver to continue this practice now that Mountain zone prime time has been re-defined as 6 to 10 PM M.T. Some 19 stations follow the alternative arrangement referred to in the May 1970 decision. Nearly 30 others present local news at 7 E.T. or P.T. (6 C.T. or M.T.) preceded by network news. On weekends, the amount of early-evening news, both local and network, is considerably smaller. More than half of the 23 stations coming under the waiver are in the top 10 markets, including 8 network-owned stations.

F.C.C. 72-905

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUEST OF ABC FOR WAIVER OF THE "PRIME TIME ACCESS RULE" IF NECESSARY IN CONNECTION WITH LATE-AFTERNOON NCAA FOOTBALL GAMES

MEMORANDUM OPINION AND ORDER

(Adopted October 11, 1972; Released October 16, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission here considers the remaining portion of a "Petition for Sports Runover Waivers" filed on August 21, 1972, by American Broadcasting Companies, Inc. (ABC), relating to NCAA college football games telecast during the late afternoon in the fall of 1972. Waiver is sought only in the event—asserted to be very unusual—that the games should run past 7 p.m. E.T., and thus into prime time. If this should happen, and there is not waiver, the network and its affiliates would be limited in their presentation of the usual three hours of network evening prime-time programming. We granted waiver for the first two dates requested (September 16 and September 30) in an action August 29, 1972 (Memorandum Opinion and Order, FCC 72-781, 25 R.R. 2d 221). We stated that before granting the requested blanket waiver for the entire fall season, we preferred to see how the arrangement worked out on these occasions.

2. This season, unlike past years, ABC has considerable latitude in selecting its NCAA games during the latter part of the season; therefore, the only other specific Saturday date mentioned in the request is October 14, when ABC plans to present the Oklahoma-Texas game with the telecast starting possibly as late as 3:30 p.m. E.T., plus regional games at that hour (starting times may be earlier depending on World Series competition). Otherwise the requests are for general waiver in the following situations:

(a) single games with the telecast starting at 3:30 p.m. E.T., and including a "pre-game show" as well as a post-game segment (although time under the waiver would not be used for the latter).

(b) Double-headers, with the telecast of the second game starting at 4 p.m. E.T., and no pre-game show before the second game; any time after 7 p.m. under the waiver would not be used for post-game material.

(c) The Gator Bowl game on Saturday, December 30, starting at 4 p.m. E.T., with no pre-game or post-game segments.

3. In dealing with similar 1971 football requests by ABC, the Commission expressed some reservations about the matter, since, on the basis of staff observation of a limited number of games, it appeared that college football games vary in elapsed time more than do professional games, and might run over into prime time more often. ABC in its present petition asserts that there really is no problem here either: the average time from kickoff to final gun of its forty 1971 games was about 2:42, with only three over 3 hours, and none of the late afternoon games running over into prime time. ABC also asserts that there is substantial public interest in grant of waiver in these cases, as recognized by the Commission in "Footnote 35" of the May 1970 Report and Order adopting the Rule, and also in past actions granting waivers in such situations. It is asserted that ABC's scheduling arrangements should be ample in the normal course of events; and that waiver should be granted to deal with the abnormal situations without disrupting regular evening schedules.

4. On the basis of observing two September telecasts, the Commission and its staff are inclined to agree with ABC that problems are not likely to occur in this connection, with these contests generally not likely to run over three hours from the start of coverage from the stadium (on September 16, the pre-game show lasted from 3:30 to 3:45; coverage from the field (introduction of players, etc.) lasted until about 3:52 and the game ran about 2 hours 53 minutes, with final gun and close of game coverage occurring about 6:45 or 6:46, followed by the usual "Scoreboard" program). Therefore, it appears that ABC has endeavored to schedule its NCAA football programming in a way reasonably designed to comply with the letter and spirit of the prime time rule. So long as overruns are not anticipated, and the network has made a reasonable effort to avoid them, the rule did not contemplate cutting off network coverage before the conclusion of a game, and waivers are warranted.

5. In view of the foregoing, IT IS ORDERED, That waiver of the three-hour limitation of the prime time access rule, Section 73.658(k), IS GRANTED to American Broadcasting Companies, Inc. (ABC) and stations commonly owned or affiliated with that network, in case it should be necessary to carry to completion ABC's 1972 Saturday NCAA and Gator Bowl football telecasts plus the usual three hours of evening network programs, provided that:

(1) If a single game preceded by a "pregame show" is involved, the telecast of the pregame show shall begin about 3:30 p.m. E.T.; or, where the Gator Bowl or a double-header is involved, that the telecast from the field of the Gator Bowl or second game begin no later than about 4 p.m. E.T.; and

(2) this waiver does not extend to the presentation of any post-game material.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

109-012—72——6

F.C.C. 72–906

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

WAIVER OF THE PRIME TIME ACCESS RULE SECTION 73.658(k) FOR "ONE TIME" NETWORK NEWS AND PUBLIC AFFAIRS PROGRAMS (REQUEST OF COLUMBIA BROADCASTING SYSTEM, INC.)

MEMORANDUM OPINION AND ORDER

(Adopted October 11, 1972; Released October 13, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING.

1. The Commission has before it the second portion of a "Request for Waivers" filed by Columbia Broadcasting System, Inc. (CBS), June 26, 1972, seeking waiver of the prime time access rule (Section 73.658 (k)) with respect to news and public affairs programs. The request involved here is for continuation during 1972–73 of the waiver, granted October 6, 1971, for the 1971–72 year, for "one-time-only" network news and public affairs programs, those not part of a series. Under the waiver, this material may be presented by stations during prime time without counting against the permissible three hours of network programming each evening during prime hours. This request has been supported by the other two networks, ABC and NBC, and opposed by Westinghouse Broadcasting Company, Inc. (Westinghouse). In an action of October 5, 1972 (FCC 72–900), the Commission granted the waiver for about three months, or until December 31, 1972, in order to permit consideration of the request and responsive material on its merits.[1]

2. CBS urges that continuation of the waiver would "enable the networks to continue such broadcasts on the pressing and newsworthy issues facing the nation." It is stated that during the coming year, special news efforts will be required to deal with matters such as the winding-down of the U.S. Viet Nam effort, material concerning political matters during the pre-election period, election coverage and analysis, the last Apollo mission in December 1972, the inauguration, and other important matters. CBS renews its assertion, in its March 1971 request which led to grant of waiver for 1971–72, that without waiver there would be substantial problems, for example, in presenting programs carrying out Fairness Doctrine obligations (e.g., "The Loyal Opposition") and many Presidential appearances, and also political

[1] The October 1971 decision granting this waiver for the 1971–72 year is reported at 32 FCC 2d 55, 23 R.R. 2d 77. The other portion of the present CBS request (waiver for network news following an hour of local news) is not involved here, having been dealt with in a Memorandum Opinion and Order of August 29, 1972 (FCC 72–783).

coverage.[2] This, it is asserted, would be unfortunate in light of the tremendous importance of news and public affairs material (noted, for example, in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969)). CBS lists five subjects which it has covered through programming presented by virtue of the waiver during 1971–72: the India Pakistan war, Vietnam, President Tito, and President Nixon's Chinese and Russian visits.

3. The other two networks made generally similar arguments in supporting the CBS request. Westinghouse, opposing as it did in 1971, urges essentially three points: (1) waiver is not *necessary* for the carriage of such material, since the networks are free to carry it during prime time by preempting regular program material (as they often do); rather it simply enables them to present regular programming *and* news and public affairs material, thus increasing their hold on prime time (citing the dissenting statement of Commissioners Bartley and Johnson in the October 1971 decision); (2) the waiver granted in 1971 was on the basis of *temporary* circumstances—the "transitional" character of the 1971–72 year, the first under the rule and when it has not yet been in full effect—and affords no support for renewal for another year; (3) continuation of the waiver, in effect on a more or less permanent basis, constitutes modification of the rule and is illegal unless done through rule-making proceedings with all interested parties having opportunity to comment.

CONCLUSIONS

4. It is to be noted that the two circumstances which largely were the basis of the grant of this request for 1971–72—the "transitional" character of the first year under the prime time access rule, and the fact that it has been a pre-election period—are, or shortly will be, matters of the past. Wherefore we agree with Westinghouse that grant of the request for an entire year, as requested, has somewhat the character of a long-term and general modification of the rule, and should not be undertaken without opportunity for public comment.

5. However, it is also true, as the networks urge, that the presentation of material of this character is of definite importance, perhaps particularly in a pre-election and election period, but also generally. It is, of course, also an area where *diversity of viewpoint* is important; but it does not appear to what extent such material would be available from other sources. Accordingly, it appears definitely desirable and in the public interest to continue this waiver for a rather brief period (beyond the extension to the end of calendar 1972 previously granted), so that the present arrangement may continue while this subject is given orderly consideration and exploration.

6. It appears that under these circumstances, a further extension of three months (for a total of six months) is appropriate.

[2] Section 73.658(k)(2) contains a limited news exemption, for "special news programs dealing with fast-breaking news events, on-the-spot coverage of news events, and political broadcasts by legally qualified candidates * * *". Although not mentioned in the CBS petition, it has been suggested that one advantage of the waiver is that it makes unnecessary what would otherwise be difficult decisions, for the networks and perhaps ultimately the Commission, as to whether a program really is entitled to exemption as coverage of a "fast breaking event" or "on the spot coverage."

7. In view of the foregoing, IT IS ORDERED, That waiver of Section 73.658(k)(1) of the Commission's Rules, the prime time access rule, IS GRANTED to the American Broadcasting Companies, Inc. (ABC), Columbia Broadcasting System, Inc. (CBS) and National Broadcasting Company, Inc. (NBC) networks, and their owned and affiliated stations in the top 50 markets, to present, without counting toward the permissible three hours prime time network material, "one-time-only" news and public affairs programs (those not part of a series) through March 31, 1973.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-930

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

REQUEST OF NBC FOR WAIVER OF THE PRIME TIME ACCESS RULE IN CONNECTION WITH MOUNTAIN AND PACIFIC TIME ZONE CARRIAGE OF NETWORK NEWS FOLLOWING A NETWORK SPORTS EVENT

MEMORANDUM OPINION AND ORDER

(Adopted October 12, 1972; Released October 16, 1972)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND H. REX LEE DISSENTING.

1. The Commission here considers a letter request by National Broadcasting Company, Inc., filed September 21, 1972, on behalf of its Mountain and Pacific time zone owned station and affiliates, asking for waiver of the prime time access rule, Section 73.658(k), with respect to carriage of network news following network sports events carried live throughout the United States. The request was supported in a letter of September 22, 1972 from King Broadcasting Company, licensee of Stations KING–TV, Seattle, Washington, and KGW–TV, Portland, Oregon, both NBC affiliates.[1]

2. The waiver requested involves the following as far as NBC is concerned: on August 29, 1972, the Commission continued for the 1972–73 year the waiver granted earlier for 1971–72, under which stations in the top 50 markets may carry network news at the beginning of prime time, without having it count toward the three hours of permissible prime-time programming, provided they have carried just previously a full hour of local news or public affairs programming. (FCC 72–783, 25 R.R. 2d 234.) NBC seeks an extension of this principle for Mountain and Pacific zone stations, to include situations where the usual early evening news pattern is abandoned because of network evening sports events, which are carried live and simultaneously throughout the U.S. and thus, in these cases, are presented from about 5 to 8 p.m. P.T. (8 to 11 E.T.). The request is that if stations in these situations present an hour of local news immediately before the sports event (e.g., 4 to 5 p.m. P.T.), they should be permitted to carry a half-hour of network news immediately after it, e.g., 8 to 8:30 p.m. P.T., without the time counting toward the three-hour limitation. The example given by NBC is the upcoming World Series weekday games, the first one on Tuesday evening, October 17

[1] The NBC request was originally advanced in a late-filed statement (August 28) supporting the CBS petition for general waiver for network news following an hour of local news. It was presented too late for consideration in that matter (which was acted on August 29), and was later renewed, with some more specific information, in the letter mentioned.

which will be carried at approximately the above hours in the Pacific zone.

3. It is noted that NBC's own station on the Pacific Coast, KNBC–TV, Los Angeles, is one of the stations which have been and are regularly carrying an hour of local news followed at 7 p.m. by network news, under the general waiver. As to the other two stations mentioned, KING–TV, Seattle, also carries 90 minutes of evening news, but from 5:30 to 7, so that it does not operate under the waiver; but the effect of network live sports broadcasts on its schedule is the same as if it did. The same apparently is true of KGW–TV, Portland.

4. In support of its request, NBC states that these live network sports situations create problems for Western stations with respect to their evening news, particularly when in the course of regular broadcasting they present 90 minutes of it. It is claimed that, essentially, the situations involved here meet the policy and concept of the general waiver, the only difference being that the regular pattern is interrupted by a sports event. It is claimed that waiver here will provide the licensee with needed flexibility and encourage local news presentations as well as carriage of network news; and that refusal of waiver would on occasion deprive viewers of their accustomed news programs. KING's statement in support states that waiver will facilitate presentation of network news in cases where its regular time has been preempted by a sports event.

5. One other fact is to be noted in connection with this request. In another action of August 29, 1972 (FCC 72–782, 25 R.R. 2d 228) the Commission granted a limited waiver of the rule to NBC and its owned stations and affiliates in connection with the World Series, in particular as to stations in the Western part of the U.S., stating that these broadcasts could be carried on the assumption that they would occupy no more than one hour of prime time in the Pacific zone (or three in the Mountain zone), regardless of how long the program actually runs. It was noted that NBC's request in this respect apparently was designed to accommodate an arrangement under which, following the World Series broadcast, KNBC–TV would present, and possibly feed to other NBC outlets on the West Coast, a two-hour movie starting at 9 p.m. P.T. This movie would be one recently shown on the network and thus not eligible for use during the "cleared" portion of prime time. Thus, if the World Series broadcast should run over three hours, more than three hours of prime time would be involved between it and the movie, requiring a waiver in these circumstances.

DISCUSSION AND CONCLUSIONS

6. After careful consideration of this request by NBC, we are of the view that, subject to certain limitations set forth below, it should be granted. It must be recognized that these stations have problems on those occasions when live, simultaneous programming is carried on the network, and these stations must present it earlier in the evening (in terms of local time) than it is carried in the Eastern and Central zones. When these circumstances prevail, the normal evening broadcast pattern in the Pacific zone, and to some extent the Mountain zone, is disrupted. Some relaxation of the rule to accommodate these situations is

appropriate. It is also to be noted that basically the NBC proposal would leave a half-hour of prime time cleared for new non-network material, which is the same amount of time as that left open under the general waiver to stations for presentation of network news at the beginning of prime time plus the usual three hours of network programming.

7. However, certain other facts must also be borne in mind. *First*, the waiver requested is not necessary for the presentation of *network* programs, since these—the sports event plus the news—occupy between them only about an hour and a half of prime time. Rather, they are asked in order to facilitate the presentation of this plus two hours of "off-network" material. *Second*, as to the occasions principally involved—the World Series—NBC and its Western outlets have already received one waiver, as mentioned above, to treat the World Series as running no more than three hours even if in fact it runs more. We do not believe it appropriate to permit two waivers to operate separately from each other, so as to reduce to below a half-hour the time left clear for new non-network material. *Third*, there appears no reason to extend this waiver to stations which have not been presenting 90 minutes of news during the early evening hours as a general practice under their regular scheduling arrangements.

8. Accordingly, IT IS ORDERED, That waiver of Section 73.658 (k), the Prime Time Access Rule, IS GRANTED, to network-owned and network-affiliated stations in the Mountain and Pacific time zones, to present network news following a network sports event or other live, simultaneous programming, without the network news counting toward the time permissible under this section, where all of the following conditions are met:

(a) At least a half-hour of prime time on the evening involved shall be devoted to material which is not network programming, off-network material, nor feature film shown in the market within the past two years.

(b) the station presents, immediately before the sports event or other network simultaneous material, a full hour of local news (except for commercial announcements or PSA's); and

(c) the station's regular schedule, when live simultaneous network programming is not involved, for the same day of the week as that involved in the waiver, includes an hour of local news and a half-hour of network news between the hours of 5 and 7:30 p.m. local time.

(d) waiver under this paragraph is granted only during the period until October 1, 1973.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-884

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
COMPLAINT OF D. J. LEARY, NATIONAL MEDIA DIRECTOR, HUMPHREY CAMPAIGN, AGAINST COLUMBIA BROADCASTING SYSTEM, REGARDING INDEMNIFICATION FORMS

MEMORANDUM OPINION AND ORDER

(Adopted October 5, 1972; Released October 12, 1972)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND REID ABSENT.

1. The Commission has before it for consideration a petition filed on June 21, 1972, by the Columbia Broadcasting System, Inc. (CBS). CBS seeks review of the Broadcast Bureau's oral ruling of May 19 (confirmed in writing on May 22 (35 FCC 2d 112)) issued pursuant to delegated authority. The Bureau ruled that a licensee's requirement that a candidate execute an agreement to indemnify it against possible liability resulting from paid political broadcasts was an "unreasonable burden and restriction on the use of a station" when applied to "uses" of the station's facilities subject to the no-censorship requirement of Section 315 of the Communications Act, as amended. The ruling was issued following receipt of the complaint of Mr. D. J. Leary, National Media Director, Humphrey Campaign, against KNXT-TV and Radio Station KNX, Los Angeles, California, both licensed to CBS. Mr. Leary alleged that the above stations had denied Senator Hubert H. Humphrey, a legally qualified candidate for nomination for President in the California primary election of June 6, 1972, equal opportunity under Section 315 of the Communications Act by demanding that the Senator submit indemnification forms and personally sign such forms before being allowed use of their facilities for 30-second announcements featuring the voice and image of the candidate. The complaint further contended that the CBS policy is "unwarranted, unreasonable, and coated with the obvious intimidation of a censorship threat in direct contradiction of candidate's rights under Section 315." On June 27, 1972, Mr. Leary filed a petition in opposition to CBS's petition for review and on July 10, 1972, CBS filed its reply to Mr. Leary's opposition to its petition for review.

2. The Bureau's letter of May 22 stated that "Whether a candidate is making the initial political appearance on a station or is appearing after a prior use by an opposing candidate, we believe that an indemnification promise is likely to be inhibiting with respect to the content of the candidate's use, as well as his decision on whether or not to use the station's facilities. In view of the immunity afforded the licensee under *WDAY* for a use by a candidate, a requirement for indemnification

appears to serve no appropriate purpose; its attendant effect is therefore an unreasonable burden and restriction on the use of a station which is inconsistent with the no-censorship requirement of Section 315." CBS requests review and reversal of the ruling or, in the alternative, that the underlying basis for the ruling be examined, reviewed and clarified by the Commission as a whole.

3. The petition of CBS states that the issue involved in the above ruling is "Does *Farmers Educational & Cooperative Union of America, North Dakota Division* v. *WDAY, Inc.*, 360 U.S. 525 (1959), protecting broadcasters from libel judgments with respect to broadcasts which Section 315 forbids them to censor, preclude broadcasters from obtaining from candidates indemnities providing that they are fully responsible for all claims arising in connection with such broadcasts?" However, we believe that the issue is a more basic one: whether the CBS requirement that candidates agree to indemnify it against all claims arising from their broadcasts is consistent with the purpose underlying that portion of Section 315(a) of the Communications Act which states that licensees "shall have no power of censorship over the material broadcast under the provisions of this section."

4. CBS states that the indemnity is intended to make the licensee whole if he suffers damage or loss as a result of the acts or words of the indemnitor, and it contends that an indemnity is not a tool of censorship. In addition to libel actions, it cites, as examples of possible causes of liability, copyright infringement, invasion of privacy and violation of union contracts during the course of a candidate's "use" of a broadcast facility.[1] It also cites the expense of defending a suit even where there is no liability.

5. We believe, however, that an indemnification requirement of the type before us is likely to inhibit a candidate's use of a broadcast facility and possibly to affect his decision on whether to utilize a station to address the public. Thus, the danger that such a requirement may undermine the full and uninhibited discussion of issues by political candidates, which it was the basic purpose of Section 315 to assure, does not appear to be balanced by an equally important need to protect the licensee. We believe that in the light of *WDAY*, *supra*, the courts would hold a licensee free from liability for any claim arising out of a "use" by a candidate where the licensee was unable under the no-censorship provision of Section 315 to prevent the act which gave rise to the claim. We believe that the cost of defending a suit where there is no liability is a part of the normal cost of doing business which a licensee assumes in the operation of its station, whether or not the licensee may later have a cause of action against the candidate whose conduct exposes the licensee to a lawsuit.

6. CBS also claims, in effect, that it is unclear how the Bureau's ruling would affect appearances by persons other than a candidate. It states that it is unclear how the Bureau's ruling would apply to a broadcast by someone speaking on behalf of a candidate who appears in

[1] CBS also points to possible liability for unforeseen union fees, citing the broadcast of June 4, 1972, by Congresswoman Shirley Chisholm. It states that the moderator of the interviewing panel, which was entirely furnished by Congresswoman Chisholm, notified CBS that he would file a claim with his union (AFTRA) for payment for services performed on the program.

front of a portrait of the candidate. CBS also states that a broadcaster cannot be certain whether a broadcast in which both a candidate and noncandidate appear constitutes a Section 315 use as defined in *Gray Communications System, Inc.*, 14 FCC 2d 766 (1968), aff'd 19 FCC 2d 532 (1969). This raises no new questions. We stated in the *Gray* case that if a use is present, the no-censorship provision of Section 315 applies to "all program material presented as part of a candidate's use * * * with no right of prior approval * * * [by] the licensee." (19 FCC 2d at 535.) As to what constitutes a use, this question will be determined on the facts of each case. As general guidelines, the following may be helpful. In determining whether a spot announcement constitutes a "use" under Section 315, "If a candidate makes any appearance on a political spot announcement in which he is identified or identifiable by voice or picture, the whole announcement should be considered a use by the candidate." Letter to *Charles F. Dykas* (—— F.C.C. 2d ——, July 13, 1972). In regard to programs, where a candidate's personal appearance, either vocal or visual, is substantial in length, integrally involved in the program, and indeed the focus of the program, and where the program is under the control and direction of the candidate, then the entire program is a "use" and the no-censorship provision of Section 315 is thus applicable to the entire program. However, the Commission does not believe that a Section 315 "use" occurs in terms of an entire program when a candidate's appearance is only an incidental inclusion in a program on which another person is the central figure. In such a case only the portion or portions of the program in which the candidate appears would be a "use" or "uses" subject to the no-censorship provision of Section 315. See *Gray Communications System, Inc., supra.*[2]

7. In conclusion it is clear that it was the intent of Congress to insure complete freedom of expression by political candidates, and therefore the no-censorship provision of Section 315 prohibits any interference, direct or indirect, with such expression. We believe that the CBS indemnification requirement is inconsistent with the intent of Congress.

8. Accordingly, IT IS ORDERED that CBS's petition for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[2] Congressional pronouncements on this aspect were stated in House Report No. 92-565, 92d Congress, 1st Session (1971) at page 9 in connection with the Federal Election Campaign Act of 1971:

"*Use:* The 'use' of a broadcasting station by a legally qualified candidate to which the lowest unit charge provisions would apply are intended to be the uses which would entitle an opposing candidate to 'equal opportunities' under the provisions of Section 315(a) * * *. Thus, there would have to be a use by the candidate through personal participation, i.e., use of his voice or image whether live or taped, including films and pictures. Where program time is involved, the candidate must have final control and direction of the program and his participation must be an integral part of it * * *."

F.C.C. 72-922

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
COMPLAINT OF THE SENATE OF THE COMMONWEALTH OF PUERTO RICO AGAINST TELEVISION STATION WIPR-TV, HATO REY, PUERTO RICO

MEMORANDUM OPINION AND ORDER

(Adopted October 12, 1972; Released October 13, 1972)

BY THE COMMISSION:

1. The Commission has before it for consideration an application by the Senate of the Commonwealth of Puerto Rico for review by the Commission of a staff action taken by the Broadcast Bureau pursuant to delegated authority which rejected a request by the Senate that television station WIPR-TV, Hato Rey, Puerto Rico, be ordered to provide time to the Senate to respond to the State of the Commonwealth address of the Governor of Puerto Rico delivered on January 14, 1972 to a joint session of the Puerto Rico legislature and carried by WIPR-TV. (Letter of March 15, 1972, 34 F.C.C. 2d 128).

2. The Senate's request, filed on February 22, 1972, alleged that WIPR had rejected a request by the President of the Senate for time to respond to the Governor's address and stated that the rejection amounted to a violation of the station's obligations under the fairness doctrine. According to the complaint, Governor Ferre is a member of the New Progressive Party, whereas the Senate is under the control of the principal opposition party, the Popular Democratic Party. Further, the opposition party in the Senate is in profound disagreement with many of the proposals made by the Governor in his January 14th address. The complaint also noted that WIPR-TV is a non-commercial station under the control of the Department of Education of the Commonwealth of Puerto Rico, which department is administered by appointees of Governor Ferre. The Senate further alleged that prior to the Governor's State of the Commonwealth address, WIPR's programming was unbalanced because members of the Popular Democratic Party had been virtually excluded from WIPR's public issue programming, whereas the Governor's political appointees and New Progressive Party members of the legislature had appeared regularly on that station to seek support for their programs and policies, and that this pre-existing imbalance was made more pronounced by WIPR-TV's decision to broadcast the Governor's address while denying the Senate an opportunity to respond.

3. In a letter dated March 15, 1972, the Chief, Broadcast Bureau, by the Chief of the Complaints and Compliance Division, acting

pursuant to delegated authority, denied the relief requested by the Senate, stating that the Commission had not been provided with detailed and specific evidence to indicate that the licensee has failed to comply with its fairness obligation. The letter cited *Allen C. Phelps*, 21 FCC 2d 12, 13 (1969), noting that under that decision there is no obligation upon a licensee to disprove general allegations of unfairness. The letter stated that, "a complaint of unfairness must be supported by information to show that the licensee has not afforded a reasonable opportunity for the expression of contrasting views on specific issues." The Bureau concluded that since the Senate had not shown that the licensee in its overall programming had failed to afford reasonable opportunity for the presentation of contrasting views, no action was warranted by the Commission.

4. It is from this action that the Senate seeks review. The petition for review points out that the original complaint alleged that the refusal to provide time to the Senate to respond to the Governor's address "made more pronounced a pre-existing lack of balance in its [WIPR–TV's] coverage of controversial issues of public importance," and requests that the Commission re-examine the *Phelps* rule, which, if it is to be applied as it was here, is said to confront complainants with virtually insurmountable procedural barriers to having their claims of noncompliance with the fairness doctrine reviewed on the the merits. The *Phelps* rule is alleged to be particularly unfair here, since the incumbent administration controls the station. The Senate also notes that in *Democratic National Committee* v. *F.C.C.*,—U.S. App. D.C.—, 460 F. 2d 891 (1972), the Court of Appeals expressed approval of the *Phelps* rule and also affirmed a Commission denial to a complainant of access to a broadcaster's logs and other documents showing programming. The effect of these rulings, the Senate states, is to deny relief to any complainant who lacks the resources to undertake continuous monitoring. Finally, the Senate states that if the Commission declines to re-examine *Phelps* it should find that the complaint was adequately specific and detailed. The Department of Education of Puerto Rico, licensee of WIPR–TV, opposes the application for review. It bases its opposition on the grounds that the petitioner has not met its burden of proof under the fairness doctrine as enunciated by *Phelps*, in that the complaint is vague and general, and that the Commission has been presented with no sound reasons as to why it should abandon or revise the *Phelps* policy.

5. For reasons which follow, we affirm the ruling of the Broadcast Bureau and deny the petition of the Senate of the Commonwealth of Puerto Rico. In *Allen C. Phelps*, *supra*, p. 13, we said:

> Absent detailed and specific evidence of failure to comply with the requirements of the fairness doctrine, it would be unreasonable to require licensees specifically to disprove allegations such as those made here. The Commission's policy of encouraging robust, wide-open debate on issues of public importance would in practice be defeated if, on the basis of vague and general charges of unfairness, we should impose upon licensees the burden of proving the contrary by producing recordings or transcripts of all news programs, editorials, commentaries and discussion of public issues, many of which are treated over long periods of time. Accordingly, although the Commission intends also to employ other appropriate procedures to insure compliance by licensees with the fairness doctrine (e.g., in-depth spot checks at renewal time), it has long been our policy normally to require that fairness doctrine complaints (a) specify

the particular broadcasts in which the controversial issue was presented, (b) state the position advocated in such broadcasts, and (c) set forth reasonable grounds for concluding that the licensee in his overall programming has not attempted to present opposing views on the issue * * *.

We see no reason in the case before us to re-examine the *Phelps* decision. As the complainant recognizes, *Phelps* has been approved by the Court of Appeals as a reasonable approach. Furthermore, here as in *Phelps*, the complaint is made up of general assertions of unfairness, with no supporting facts. It is not enough to allege that there are opposing political parties and that legislative members of one party have been virtually excluded from public issue programming while the opposition party appears regularly to seek support for their programs and policies. As we have pointed out many times, the fairness doctrine is issue oriented. However, the complaint of the Senate mentions no specific issue, and contains no reasonable attempt to describe any occasions on which any issues have been discussed or by whom. We do not believe that the *Phelps* ruling is called into question on this record.

6. For the same reasons, it is clear that the complaint is inadequate under *Phelps*. Even though the complaint rests in large part upon a particular broadcast, the State of the Commonwealth address, nowhere in either the original complaint or this application are there to be found any delineated issues of a controversial nature contained in the Governor's address. There is no allegation here that any specific controversial issue presented in the Governor's address has not been the subject of opposing viewpoints in the licensee's overall programming, or that a reasonable opportunity has not been afforded to present such views. Rather there is only the blanket statement that he spoke on issues which were of a controversial nature, in the sense that the Senate opposed the programs advocated by the Governor. Such a generalized statement of facts offers the Commission nothing of an evidentiary nature to support the complaint. It was precisely this generalized type of pleading that the *Phelps* ruling was designed to discourage, since it is impossible for the Commission to make a reasoned determination of whether there has been a fairness doctrine violation. In order for the licensee to refute these charges, he would have to produce transcripts of all his programming, editorials and commentaries on public issues, a burden this Commission rejected in *Phelps*.

7. Petitioner also states that two commercial stations in Puerto Rico allowed the Senate to respond to the Governor's address, noting that the Governor's message is the equivalent of the President's State of the Union address, and that the three major U.S. networks have afforded the opposition party an opportunity to respond to that address. We take official notice of the fact that in recent years the major television networks have permitted an opportunity for the opposition party to respond to the President's message. However, no obligation to do so has been imposed upon any licensee by the Commission. On the contrary, *In The Matter of The Handling of Public Issues Under The Fairness Doctrine And The Public Interest Standards of The Communications Act*, First Report in Docket 19260, FCC 72–534, June 22, 1972, —— FCC 2d ——, we rejected arguments based upon

a right of response to specific addresses. Thus, the ACLU had argued that the responsibility of the licensee under the fairness doctrine should be extended to require that comparable opportunities be made available for opposing spokesmen to comment on the issues raised in any broadcast appearance of any public official including the President. The Democratic National Committee urged that the Commission create a presumption that every presidential broadcast involves a controversial issue of public importance, thereby requiring the licensee to seek out appropriate spokesmen with an opposing viewpoint and to afford them equal opportunities. In responding to those proposals, we said:

> But in any event, it would not be sound policy to adopt the DNC or ACLU proposals. From the time of the *Editorializing Report*, 13 FCC 1246 (1949), to the present, we have been urged to adopt even more precise rules—always in the cause of insuring robust debate—(e.g. the argument advanced in 1949 and now repeated by the ACLU that fairness requires the contrasting viewpoint to follow immediately the presentation of the first viewpoint * * *). However well intentioned these arguments are, we believe that increasingly detailed Commission regulation militates against robust, wide open debate. The genius of the fairness doctrine has been precisely the leeway and discretion it affords the licensee to discharge his obligation to contribute to an informed electorate * * *. Thus the argument for flexibility, rather than rigid mechanical rules discussed in *Committee For Fair Broadcasting of Controversial Issues*, 25 FCC 2d 283, 292 (1970) remains persuasive. Applying those principles, we do not believe it appropriate to adopt policies that might well inhibit reports to the electorate by elected officials. Rather, the general fairness approach of facilitating such reports and at the same time insuring the public is reasonably informed concerning the contrasting viewpoints best serves the public interest. *In the Matter of the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Supra*, p. 11.

8. Finally, the Senate states that it has undertaken an analysis of the appearances of the members of Governor Ferre's administration on WIPR–TV in the past three years. It says that the results of that study were not available when the complaint under consideration was filed and it therefore concluded that it was precluded under 47 CFR 1.115(c) from presenting this information in a petition for review. Nevertheless, the Senate says that it is prepared to submit that analysis to the Commission if this application for Commission review is granted, the purpose being to demonstrate that there has been unwarranted preference given to Governor Ferre, his political appointees and New Progressive Party members of the legislature. The Senate may, of course, if it wishes, file a new complaint containing new information. However, we think it best to conclude this proceeding, leaving to initial staff consideration any new matters presented.

9. Accordingly, the staff action taken by the Broadcast Bureau IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-907

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Cease and Desist Order To Be Directed Against SERVICE ELECTRIC CABLE TV, INC., ALLENTOWN AND BETHLEHEM, PA.	Docket No. 19321 Files Nos. SR-97014, SR-8701

MEMORANDUM OPINION AND ORDER

(Adopted October 12, 1972; Released October 16, 1972)

BY THE COMMISSION:

1. Before the Commission for consideration is an application for review of a Review Board Memorandum Opinion and Order, FCC 72R-221, released August 11, 1972, filed by Service Electric Cable TV, Inc. on August 17, 1972. Responsive comments were filed on August 29, 1972, by the Commission's Cable Television Bureau, and an opposition to the application was filed on August 29, 1972, by WBRE-TV, Inc., licensee of Station WBRE-TV on Channel 28 at Wilkes-Barre, Pennsylvania. Additional pleadings were filed on September 11, 1972, by WBRE-TV and Service Electric. In the order under review, the Review Board directed Service Electric and WBRE-TV to take complete joint field intensity measurements to locate the television station's contours and other disputed contours. Service Electric seeks a reversal of that order and a remand of this case to the Examiner for determination on the basis of the evidence of record. We believe that important questions are presented which merit our consideration, particularly in light of the history of this proceeding, but we affirm the Review Board's decision.

2. This proceeding was initiated by an order directing Service Electric to show cause why it should not be ordered to cease and desist from further violation of section 74.1103 (a) and (e) of the Commission's former Rules[1] by its refusal to carry and accord program exclusivity to Station WBRE-TV, affiliated with NBC, on its CATV systems at Allentown and Bethlehem, Pennsylvania. At the hearing, the parties stipulated that, when contours are calculated by the prediction method, WBRE-TV places a principal community contour over the CATV communities whereas KYW-TV, the NBC outlet on Channel 3 at Philadelphia which presently is being carried on the CATV systems, places a contour which is less than principal community grade over each community. Thus a prima facie presumption was created as to the location of the pertinent contours and, in the absence of countervailing evidence, would establish that WBRE-TV has priority over KYW-TV. *Bluefield Television Cable*, 10 FCC 2d 731, 732 (1967).

[1] The pertinent provisions of the current rules are Sections 76.57(a), 76.91, and 76.93(a).

Service Electric asserts, however, that the actual, as distinguished from the predicted, contours of the two television stations are such that both stations are of equal priority. In support of this contention, Service Electric introduced measurement data which indicated that the Grade A contour of both stations penetrates Allentown, and that both place a Grade B contour over Bethlehem. This engineering statement and the supporting data were accepted into evidence. In rebuttal WBRE–TV attempted to introduce other measurement data tending to show that WBRE–TV places a higher priority signal in Allentown and Bethlehem than does KYW–TV, but the evidence was rejected on the objections of Service Electric and the Cable Television Bureau that the measurements were incomplete and did not demonstrate the location of the actual contours of either WBRE–TV or KYW–TV.[2] In view of the rejection of its evidence, WBRE–TV requested time to take complete measurements and have them introduced into evidence, but this request was denied by the Examiner.

3. WBRE–TV appealed the Examiner's rulings to the Review Board, contending that its proffered exhibits were admissible as rebuttal evidence to show both that Service Electric's exhibits do not accurately reflect the location of the signal contours of WBRE–TV and that at least portions of Allentown and Bethlehem fall within the principal community contour of that station (Tr. 167). It was WBRE–TV's contention that additional measurements would serve no useful purpose since they would not have resulted in any more information going to the dispositive question of whether portions of Allentown and Bethlehem are within WBRE–TV's principal community contour;[3] and that additional measurements or data are "mathematically irrelevant" to the resolution of the dispositive issue in the case. While the matter was pending before the Review Board, WBRE–TV prepared another engineering study which it submitted by letter to the Board. According to WBRE–TV, the new data constitutes a complete set of measurements with plotted contours which demonstrate not only that the principal community contour of WBRE–TV encompasses all of Allentown and a major portion of Bethlehem, but also that additional measurements were irrelevant and immaterial to the factual issue presented herein as it had contended before the presiding Administrative Law Judge. It therefore renewed its request that the exhibits proffered at the hearing be admitted into evidence. In the alternative WBRE–TV requested that the Board permit the introduction of the new engineering study at the hearing.

4. The Review Board affirmed the Examiner's rejection of WBRE–TV's exhibits on the ground that the limited data contained therein may only reflect signal strength resulting from local conditions and, for the purposes of determining priority, sufficient data must be submitted to establish the location of the contours. The Board further held, however, that steps must be taken to adduce the best evidence obtainable for the purpose of providing a proper basis for making the public interest determination required in this case, and to eliminate further

[2] WBRE–TV took no measurements of KYW–TV's signals since it accepted Service Electric's showing as to that station.

[3] The exhibits indicated that at some locations within or beyond the city limits of each city, the signal levels of WBRE–TV exceeded Grade A service.

delay in this expedited proceeding due to disagreements among the parties. It therefore directed WBRE–TV and Service Electric to make complete joint field intensity measurements within 60 days to locate the pertinent contours necessary for a final determination on the merits. With respect to the engineering evidence submitted by letter during the pendency of the appeal, the Board held that acceptance thereof would be contrary to good hearing procedure and would serve no useful purpose in view of its disposition of the appeal.

5. While WBRE–TV has reserved the right in the event of an adverse initial decision [4] to challenge the Review Board's affirmance of the Examiner's ruling which excluded its exhibits, it has not sought review of the Board's decision and has expressed its willingness to participate in the taking of joint measurements. Service Electric, however, has applied for review of that portion of the Review Board's order which directed the taking of joint measurements. The applicant contends that this case should be decided on the basis of the evidence presently of record, that it has expended substantial sums in making its measurements; that WBRE–TV had adequate opportunity to prepare its case and should not be allowed "two bites at the same apple"; and that the Review Board's order is contrary to the rule of administrative finality. At a minimum, Service Electric urges, the order for joint measurements should be conditioned on WBRE–TV's paying all expenses in connection therewith. Service Electric therefore requests the Commission to sustain the Review Board's ruling that the Examiner properly excluded WBRE–TV's exhibits but reverse that portion of the Board's order which directs the taking of joint measurements. It also requests that the Commission strike the letters and attachments submitted by WBRE–TV to the Review Board. The Cable Television Bureau supports the application for review. In addition to the doctrine of administrative finality it advances the argument that there will be no "continuing engineering 'disagreement' that the Review Board fears" if Service Electric's engineering study is the only probative engineering evidence in the proceeding, and that Service Electric should not be deprived of the "decisive evidentiary advantage of successfully offering, at the proper time, legally uncontroverted engineering evidence * * *."

6. In assessing the weight to be accorded Service Electric's "two bites" argument we deem it appropriate to take into account Service Electric's own conduct in connection with the matters under consideration. By a pleading filed on September 14, 1970, Service Electric requested a waiver of the rules pertaining to carriage and nonduplication protection for WBRE–TV's signals and advanced as one of the arguments in support thereof that the station's actual Grade B contour falls short of the Allentown-Bethlehem area. The Commission found that the engineering study submitted in support of this contention was unacceptable for the purpose of determining the applicability of Section 74.1103 and that no sufficient grounds had been advanced to justify a waiver. The Commission therefore denied the waiver request

[4] Under Section 1.115(e)(2) of the Rules the "failure to file an application for review of an interlocutory ruling—" of the Review Board does not "preclude any party entitled to file exceptions to the initial decision from requesting review of the ruling at the time when exceptions are filed."

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and directed Service Electric to carry and provide program exclusivity to WBRE–TV within 30 days. See *Service Electric Cable TV, Inc.*, 28 FCC 2d 77, released March 16, 1971. No effort was made at that time by Service Electric to obtain adequate measurement data concerning the location of WBRE–TV's contours or to challenge the validity of the Commission's determination either by a petition for reconsideration or by judicial review. Instead the cable operator requested and received, with the consent of WBRE–TV, an extension of time for the purpose of obtaining "the equipment needed to enable it to comply with Section 74.1103 * * *". In a pleading filed June 28, 1971, Service Electric requested a further extension because of non-delivery of certain equipment and represented that "if the equipment should be delivered and installed prior to the estimated date of delivery the carriage and nonduplication protection would commence immediately." The application was opposed by WBRE–TV which renewed its request for a show cause order and this proceeding was initiated. Only after the release of our Order to Show Cause on September 29, 1971, did Service Electric undertake to obtain engineering evidence concerning the location of the WBRE–TV contours. In these circumstances, it ill behooves Service Electric to complain about a "second bite" for WBRE–TV. Had Service Electric produced adequate engineering evidence in support of its waiver request or within a reasonable time thereafter instead of promising carriage and nonduplication protection, this case would long since have been completed.

7. An even more significant reason for affirming the Review Board's decision is the fact, as WBRE–TV points out, that we are not concerned here solely with a dispute between private parties but with matters pertaining to the public interest. Although the carriage and nonduplication provisions of the rules benefit the television station licensee, they were promulgated because of the very important public interest considerations relating to the maintenance of local outlets of expression and for the other reasons set forth in the rulemaking proceeding. If the provisions of the rules are applicable and no sufficient grounds exist which justify a waiver, Service Electric must be required to comply therewith. Additionally, we note that under the express provisions of Section 312(b)–(d) of the Communications Act, which governs cease and desist proceedings, "both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission." While WBRE–TV is expected to share in the task of introducing evidence in view of its substantial interest in the outcome of this proceeding, the Commission has an affirmative statutory obligation which it must meet.

8. In our view the dispositive issue with respect to the argument of administrative finality is not, as Service Electric and the Cable Television Bureau contend, whether *WBRE–TV* should be given a "second bite" but whether the *Commission* is required to undertake the resolution of important public interest questions on the basis of an incomplete or inadequate record in a case in which it has the ultimate burden of proof and where additional material and relevant evidence may be available. We do not believe that we are so required or that, under the circumstances of this case, a determination on the basis of the evidence presently of record would comport with our statutory responsibility

to protect and promote the public interest. See *Citizens TV Protest Committee* v. *Federal Communications Commission*, 121 U.S. App. D.C. 50, 348 F. 2d 56 (1965); *Clarksburg Publishing Co.* v. *Federal Communications Commission*, 96 U.S. App. D.C. 211, 225 F. 2d 511 (1955). The Commission cannot undertake to make field intensity measurements in order to locate actual contours and our decision herein should not be construed as holding that we propose to do so. We do hold, however, that where a substantial claim is advanced by a respondent in a show cause proceeding that the actual contours of a television station are other than as indicated by the prediction method of calculating contours, every effort must be made to adduce at the hearing all relevant and reasonably available evidence necessary to enable the Commission to make a determination on the basis of a complete record. In this connection, we agree with WBRE–TV that if the failure to take joint measurements was improper, the fault was not solely that of the television station licensee. Nothing before us indicates that any suggestion by the Cable Television Bureau, which is charged with the responsibility for carrying the Commission's burden in this type of proceeding (Sections 0.85(c) and 1.21(b) of the Rules) or by Service Electric that joint measurements be taken would have been rejected by WBRE–TV or that the licensee would have been uncooperative. For the foregoing reasons, we conclude that application of the doctrine of administrative finality to preclude the further hearing ordered by the Review Board would be inappropriate in this case.

9. The further contention of the Cable Television Bureau that by reason of the Review Board's affirmance of the Examiner's ruling which excluded WBRE–TV's engineering exhibits, there would be no engineering "disagreement" if Service Electric's engineering study remains as the only engineering evidence in this proceeding, must be rejected. On the basis of the predicted contours WBRE–TV is entitled to priority over KYW–TV, and the critical question to be resolved at the hearing is whether the actual contours of either or both television stations lie elsewhere. However, the mere fact that Service Electric's engineering exhibit was admitted into evidence does not conclusively establish the location of the contours or necessarily overcome the prima facie showing based on predicted contours. *Jones* v. *N. V. Nederlandsch Amerikaansche Stoomvaart M*, 374 F. 2d 189 (3rd Cir., 1966) cert. denied 388 U.S. 911. The weight and sufficiency of Service Electric's evidence is a matter to be determined by the trier of the facts and must be evaluated in light of the cross-examination of the cable operator's expert witness, qualifying statements by him, and any other relevant evidence of record. *30 Am Jur 2d, Evidence* Sections 1083, 1102, 1104–1106, 1112, 1144; *Koshland's Estate* v. *Commissioner of Internal Revenue*, 177 F. 2d 851 (9th Cir., 1949). See also: *Dicker* v. *United States*, 122 U.S. App. D.C. 158, 352 F. 2d 455 (1965) *cert. denied* 383 U.S. 936; *Carter Products* v. *Federal Trade Commission*, 201 F. 2d 446, 452 (9th Cir., 1953) modified on other grounds, 346 U.S. 327.

10. As we and the Review Board have had occasion to point out, the location of actual contours is an extremely difficult undertaking by reason of the effect of weather conditions, season, terrain and other

factors on signal intensity.[5] An additional complication is the fact that the place where a particular measurement is taken is a matter of judgment by the engineer on the scene where rugged terrain or obstacles along the path requires a departure from strict adherence to a specified procedure; and how that judgment is exercised may affect the ultimate conclusion reached as to contours.[6] Whether the judgment exercised by Service Electric's engineer is subject to challenge or whether there are deficiencies or weaknesses which detract from the reliability of its engineering evidence or the validity of the conclusions reached therein, we express no opinion. Those are matters for initial determination by the presiding officer who saw and heard the witnesses and who will have the benefit of the parties' views as expressed in their proposed findings and briefs. Nevertheless, a disagreement may, and apparently does, exist as to the weight which should be accorded Service Electric's engineering evidence and whether it is sufficient to overcome the showing based on predicted contours,[7] even though WBRE–TV's rebuttal evidence is not a part of the record.[8]

11. Other arguments advanced by Service Electric and the Cable Television Bureau in their pleadings, as well as the requests for affirmative relief contained therein, have been considered but we conclude that they are without merit. The Review Board neither abused its discretion nor committed any prejudicial error which would justify our disturbing its decision and we shall not do so.[9]

12. Accordingly, IT IS ORDERED, That the application for review of the Review Board's Memorandum Opinion and Order, FCC 72R–221, released August 11, 1972, filed by Service Electric Cable TV, Inc. on August 17, 1972 IS GRANTED to the limited extent set forth herein, but in all other respects IS DENIED; and

13. IT IS FURTHER ORDERED, That the aforesaid Memorandum Opinion and Order of the Review Board IS AFFIRMED; and

14. IT IS FURTHER ORDERED, That the joint field intensity measurements ordered by the Review Board be made within sixty (60) days after the release date of our Memorandum Opinion and Order herein; and

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[5] *CATV*, 6 FCC 2d 309 at 313, fn. 6 (1967); *Mission Cable TV, Inc. et al.*, 4 FCC 2d 236, 239–240 (1966); *Potomac Valley Telecasting Corporation, et al.*, 21 FCC 2d 851, 853–856 (1970) review denied, FCC 70–530, released May 26, 1970.

[6] Service Electric's engineer, Mr. Kennedy, conceded at the hearing that the engineer making the measurements frequently must exercise his judgment as to measuring locations (Tr. 132–134).

[7] WBRE–TV advanced the contention that Service Electric Exhibit No. 1 does not accurately reflect signal strength at certain points along the radials. In its decision, the Review Board noted the "wide discrepancies in the different fields measured by the two engineering firms involved in this proceeding—" (par. 10), and Service Electric objects that in making this observation the Review Board improperly considered the letters and attachments thereto which had been submitted by WBRE–TV (par. 3, *supra*). We disagree. In fashioning an order which would best serve the public interest, the Review Board was entitled to examine all of the submissions of the parties.

[8] *In 29 Am Jur. 2d, Evidence* Section 254 (p. 306) the following is stated as to rebuttal evidence:

"Evidence not in and of itself admissible may become admissible, by reason of evidence introduced by an adversary, either in rebuttal of testimony which has been given or by way of explanation thereof."

See also, *Id.* at Section 269 (p. 318). Whether the exhibits proffered by WBRE–TV were admissible for this limited purpose is neither before us nor necessary to the disposition of this application for review and we express no opinion with respect thereto.

[9] It is not believed necessary to issue instructions concerning the resolution of possible engineering disagreements as suggested by the Cable Television Bureau. Any such disagreements may readily be resolved by the parties through consultation with the Commission's engineers in the Broadcast Bureau or the Cable Television Bureau.

15. IT IS FURTHER ORDERED, That the hearing in this proceeding be remanded to the presiding Administrative Law Judge for further hearing and that every effort be made consistent with the requirements of due process to expedite the disposition of this case.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-910

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of METROTEC, INC. For a Construction Permit To Establish New Facilities in the Domestic Public Land Mobile Radio Service at Akron, Ohio	File No. 5835-C2-P-71

MEMORANDUM OPINION AND ORDER

(Adopted October 12, 1972; Released October 16, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it for consideration: an application for review filed January 10, 1972, by Buckeye Communications Company (Buckeye); an opposition filed February 1, 1972, by Metrotec, Inc. (Metrotec); and a reply filed February 16, 1972, by Buckeye.[1] The application requests Commission review of staff action of December 17, 1971 by which Metrotec's above-referenced application was reinstated to its status as of June 30, 1971.

2. Briefly, the sequence of events is as follows: Metrotec on April 16, 1971, filed an application for a construction permit to establish new facilities on the frequency 35.22 MHz in the Domestic Public Land Mobile Radio Service (DPLMRS) to serve the Akron, Ohio area. The application appeared on Public Notice on May 3, 1971. No petition to Deny was filed within the time allowed under Section 309(d)(1) of the Communications Act of 1934 as amended and Section 21.27(c) of the Commission's Rules. Also no mutually exclusive application was filed as of June 30, 1971, when the application was returned as defective for non-compliance with Sections 21.15(c)(2) and 21.120(a) of the rules. The former section requires that when a corporation's articles of incorporation do not specifically authorize it to operate as a communications common carrier a statement is required from qualified legal counsel that specific authorization is not necessary. Section 21.120(a) requires that a proposed transmitter shall be of a type accepted by the Commission for use under the applicable Rules of Part 21. The defects named were corrected and the application refiled on July 30, 1971, with the request that it be reinstated as of June 30, 1971, for reasons given below. Instead the application was listed on Public Notice on August 9, 1971, as a new application, since it appeared to

[1] Time to file pleadings had been extended by the staff.

propose a new transmitter. Thereafter, on September 14, 1971,[2] Metrotec filed a Petition for Reconsideration of that action. For now, pleadings may be summarized briefly. Metrotec stated that it believed that the non-compliance with Section 21.120(a) (non-type-accepted equipment) caused the return of its application and explained that non-compliance as simply a typographical error. It said the application was at first prepared correctly, i.e., type accepted equipment was listed; but when the application was transcribed to final form, transmitter number CT1–350–B was listed as CF1–350–B. An affidavit from the engineering consultants who prepared the application for filing certified that the error occurred while transcribing the application. Metrotec claimed this was a minor defect which could be cured by a minor amendment. It stated it had been harmed by listing the resubmitted application as new since it was subjected again to Petitions to Deny and to the filing of competing mutually exclusive applications.[3]

3. Buckeye as an existing licensee and also as an applicant for a new one-way paging frequency (152.24 MHz) in the Akron area, opposed the Petition for Reconsideration. Buckeye claimed that either of the admitted defects was sufficient to cause the application to be returned, since both were major. It claimed it had not protested the original application since it recognized that the application was fatally defective and would be returned routinely. However, it would have protested the original application (as it did the resubmitted one) if it had appeared acceptable, since Buckeye regarded Metrotec's application as economically mutually exclusive with its own Akron application, and also asserted that the Metrotec application was cut-off (Sections 1.227(b)(3) and 21.30(b) of the Rules) by its own application.

4. Metrotec in its reply argued that form should not be raised over substance.

5. On December 17, 1971, the Chief Common Carrier Bureau (Bureau) decided the matter in favor of Metrotec. The Bureau stated:

> Metrotec has shown to our satisfaction that the defect in its application was only a typographical error. While we emphasize that it is the duty of an applicant to file as accurate an application as possible, we believe that in the present case favorable reconsideration is justified * * * As to the Petition to Deny filed by Buckeye against Metrotec's application, we will decide how it is to be treated when the application comes up for disposition. We should note here that the application has not yet been completely processed and while the applicant has corrected the defects listed in our letter of June 30, 1971, that does not mean it may not require further corrections.

Thereafter, Buckeye filed the present application for review.

6. Buckeye lists three questions for review: (a) whether the Bureau action was in conformity with Section 309(b) of the Communications Act; (b) whether the action of the Bureau was in conformity with

[2] Metrotec had requested an extension of time to file its petition, and believed this had been granted. However, as Buckeye pointed out in its Application for Review, the extension was not granted. This seems to have been an oversight, since no objection to the request was made, and the extension would have been granted routinely. At all events, this defect was not raised during the consideration of the petition for reconsideration, and we do not think it is important now.

[3] In fact, a petition to deny was filed by Buckeye and electrically mutually exclusive applications were also filed. After reconsideration was granted by the Bureau, these applications were returned, and the applicants filed an Application for Review. However, they later dismissed that Application, and so no electrically mutually exclusive applications are on file.

Section 309(d) of the Act, in returning the Metrotec application to its status as of June 30, 1971, without consideration of Buckeye's Petition to Deny or Dismiss the Metrotec application, filed within 30 days of the Public Notice of August 9, 1971; and (c) whether the action was in conformity with Title 5, United States Code, Section 555(e), (Administrative Procedure Act) in that no rational or adequate statement of the grounds was given.

7. In support of these arguments Buckeye claims that the Metrotec application was substantially amended to correct the admitted defects, that pursuant to Section 309(b) of the Act the listing on Public Notice was necessary and a Petition to Deny may then be filed pursuant to Section 309(d)(1). It also claims that the Bureau erroneously assumed there was no mutually exclusive application on file as of June 30, 1971. It says this was an error because of Buckeye's pending application, and the Bureau should have considered Buckeye's Petition to Deny or Dismiss the Metrotec application before acting on Metrotec's Petition, so that refusal to consider it violated Section 309(d). Finally, Buckeye claims no rational basis for the decision was given and the decision only referred to the transmitter error. No mention was made of the defect under Section 21.15(c)(2).

8. Metrotec, in its opposition, claimed there was no mutually exclusive application on file and so there was no need for the Bureau to consider Buckeye's Petition to Deny until Metrotec's application was being considered for grant. Next Metrotec argues its amendments were minor and hence no period for filing petitions was created. It supports this argument by pointing to Section 21.23 [4] which indicates the type of amendments which are major. It claims that its amendments were not of this nature. Next, Metrotec disputes Buckeye's claims about the Administrative Procedure Act. It interprets Buckeye's argument to be a complaint that Buckeye's Petition to Deny was dismissed without adequate reasons being given. Using this interpretation, it then asserts that Buckeye's petition is still on file and so Buckeye has not been harmed. Metrotec also believes the Bureau decision logically followed the Bureau's finding that nothing but a typographical error occurred. Finally, Metrotec claims that the public interest has been served by the Bureau's decision.

9. Buckeye rejects Metrotec's arguments in its reply. It claims that there were defects; that Section 21.20 requires that defective applications be returned; and so the Bureau had no choice but to return the application. It renews its argument on "substantial amendments" by saying that this term in the act is not necessarily the same as a "major" amendment within the Rules, but that the Act must control. It concedes a "major" amendment would probably be "substantial", but it denies the converse. "Substantial" it defines as "having substance in relation to Rule requirements." Thus it says that even a "minor" amendment may be "substantial" in that any amendment that corrects patent defects in an application must be considered to have "sub-

[4] Section 21.23(c) gives as examples of major amendments, "* * * any amendment which will change or add a frequency; or improve the operating characteristics of an existing or proposed station; or enlarge the service contour or significantly change the location or points of communication of an existing or proposed station; or which will materially alter the nature of an existing or proposed service * * *."

stance", and so must be a "substantial" amendment under the Act. Thus under Section 309(b) of the Act a new Public Notice was required, and under Section 309(d) of the Act Buckeye had the right to file a Petition to Deny. It also questions whether the 30 day provision in Section 21.27(c) of the Rules, limiting the filing of Petitions to Deny to 30 days after the Public Notice of the filing of an application, is valid, since Section 309(d)(1) allows the Commission to specify a period (not less than 30 days) reasonably related to a time when the application would normally be reached for processing. It contends the specified 30 day period is not reasonably related to present processing of DPLMRS applications. From all of this it concludes the Bureau action was invalid. It then reaffirms its belief that it had an economically mutually exclusive application on file more than two years before Metrotec filed its application and so Metrotec's application should be cut off. It claims that the cut-off rules apply to any mutually exclusive application, and that the Commission has so held, *Allocation of Frequencies in the 150.80–162 MC/S Band*, 12 FCC 2d 841, (1968) reconsideration denied, 14 FCC 2d 269, (1968), affirmed, *Radio Relay Corp. v. FCC* 409 F. 2d 322 (1969). It asserts that this interpretation is required under the Act, since a new applicant proposing a service competitive with an existing carrier must show benefits to the public from the competing service. Competition alone is not in the public interest, and the construction of duplicating facilities performing substantially the same function is contrary to the public interest, *General Telephone Co. of the Northwest, Inc., et al.*, 17 FCC 2d 654 (1969). Finally, it asserts that its argument concerning the Administrative Procedure Act only went to the Bureau's dismissal of its Opposition to Metrotec's Petition for Reconsideration, and not to its own Petition to Deny as Metrotec assumed.

10. The first inquiry must go to the nature of the amendments made by Metrotec after dismissal of its application. These were (1) a statement from legal counsel that Metrotec was qualified, under Ohio law, to operate as a common carrier, and (2) a change of one letter in the transmitter type number. In determining whether an amendment in the DPLMRS is "substantial" under Section 309(b), or "minor" under Section 309(c) of the Act, we must recall that what is being amended is a proposal to construct a radio station which is to serve a specific area with specific equipment, etc. Thus, we look at the amendment to see if it alters the proposed service, and if so, in what way. In short, we should concentrate on the proposal and not on nomenclature. Here, the proposal is not altered at all. The letter from legal counsel certainly does not change it, nor does the correction of the transmitter type number.[5] Thus, we believe the Bureau correctly decided that the amendments were minor within Section 309(c) of the Act, and that, conse-

[5] Obviously, if the transmitter proposed had been non-type accepted, the application would have been subject to return, and any amendment would have been substantial or major, since it would have altered the nature of the proposed service. However, the Bureau found that a proper transmitter was improperly listed, due to a typographical error, and from the evidence this appears to be a reasonable finding.

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quently, neither Section 309(b) or 309(d) applied. In view of this, we reject Buckeye's arguments on what constitutes "substance." [6]

11. Next, Buckeye contends that the Bureau gave no reasoned explanation for its decision to grant reconsideration. It is true that the decision could have been expanded, but basically it found that there was a typographical error in listing the transmitter type number. Implicitly, it concluded that no new transmitter was proposed and no major amendment of the application was submitted, and accordingly a new public notice was not needed. Also, by implication, it found the letter from Ohio counsel was a minor amendment. We agree with this analysis as expanded here.

12. Finally, Buckeye claims the Bureau should have examined its Petition to Deny or Dismiss Metrotec's application, prior to granting reconsideration. As we understand this argument, Buckeye believes the Metrotec application is mutually exclusive with one of its own and should be dismissed; and that if the Bureau had examined the petition, it would have dismissed Metrotec's application entirely instead of granting reconsideration. Buckeye misunderstands the nature of economic mutual exclusivity. In cases of electrical mutual exclusivity, the fact that grant of one application will preclude a grant of others is usually readily apparent from an engineering study. When allegations of economic mutual exclusivity are made the case is far different, since it is almost impossible for the Commission, in DPLMRS cases, to conclude that grant of one application would preclude grant of the other for economic reasons. As a result, no application in the DPLMRS has been returned as cut-off, due to economic mutual exclusivity, although applications have been designated for hearing on the grounds of economic mutual exclusivity (see cases cited in para. 16 *infra*). A decision on whether an application should be designated for hearing depends on the specific facts alleged by the protestant, and the "need" showing made by the applicant. Here, Buckeye has not alleged facts to show that a grant to Metrotec would preclude grant of its own application, and Metrotec has made a strong independent "need" showing, as described in Para. 17 below. Accordingly, we do not find any economic mutual exclusivity, and so do not find any error in the Bureau's action on this basis.

13. From the above, Buckeye's application for review must be denied. However, we have decided that we should treat its petition to deny at this time.

14. Buckeye showed standing as an existing licensee (Station KLF 572 in Akron) and as an applicant for a one-way paging station. It argues that it and Akron Mobile Telephone Company, also an applicant for a one-way paging station, can handle all paging needs in the area. It also says that Metrotec has shown no need for another carrier in Akron; that a grant to Metrotec would duplicate existing and proposed facilities and would cause economic harm and endanger the viability of existing or proposed carriers; that the Metrotec application should be dismissed as cut-off; and that at any event the

[6] It should be noted that authority has been delegated to the Chief of the Common Carrier Bureau to determine whether an amendment is "major" (Sec. 0.291(h)). Further the Bureau Chief has discretion as to whether an application is to be returned as defective, *Walker & Townsend, Inc., et al.*, 10 FCC 2d 585, 589 (1967).

Buckeye application is entitled to comparative consideration with Metrotec's, as required by *Ashbacker Radio Co. v. F.C.C.* 326 U.S. 372 (1945).

15. Metrotec, in its opposition, said that Buckeye had not alleged any specific facts as required by the Act. As to the need issue, it pointed to 42 letters on file with the Commission from prospective subscribers, which indicated that 80 units could be put into use at once.

16. Buckeye, in its reply, admitted there was a need, but contended there was no need it could not satisfy. It reaffirmed its position that a grant to Metrotec would be a wasteful duplication of existing facilities, citing *Lloyd Frame* 24 FCC 80 (1958), *Alert*, 29 FCC 1215 (1960), *Associated Telephone Answering Service*, 7 FCC 2d 143 (1967), *Wm. Garrett Driskell* 17 FCC 2d 650 (1969), and *Long Island Paging*, 20 FCC 2d 519 (1969). Finally it reasserts its claim of mutual exclusivity.

17. Buckeye's petition must be denied. From the discussion above, it should be evident that we do not accept Buckeye's contention that the Metrotec application should be returned as cut-off due to an economically mutually exclusive application. Buckeye has not shown that a grant to Metrotec would preclude a grant of its own application. As to economic harm, Buckeye has not alleged any specific facts which would show that a grant of the application would be *prima facie* inconsistent with the public interest. Metrotec, on the other hand, by a later amendment to its application, has filed with the Commission over 60 letters from potential subscribers, desiring over 100 units. Metrotec claims that a few of these persons are presently being served by Buckeye (Station KLF572, as of its last Form L, Dec. 31, 1971, was serving over 80 paging subscribers) but would prefer service from Metrotec. We believe, in these circumstances, that Metrotec has clearly shown that there is a need which is not being met, and which it can meet. This, of course, distinguishes the case from those cited by Buckeye, para. 16, *supra*, where the applicants had not made a showing of this type. In addition we cannot find any wasteful duplication of facilities in light of this strong independent need showing.

18. Finally, we do not see any need for giving Metrotec's application comparative consideration with Buckeye's under *Ashbacker*[7] since that case only requires such consideration when grant of one application precludes grant of another. As indicated above, that is not the case here. Moreover, it should be remembered that Buckeye is already offering paging in the Akron area.

19. We find Metrotec to be financially, technically, legally, and otherwise qualified to render the service proposed.

20. In view of the foregoing, IT IS ORDERED that the application for review filed by Buckeye Communications Co. IS DENIED; the application of Metrotec, Inc., for new facilities in the Domestic Public Land Mobile Radio Service at Akron, Ohio File No. 5835–C2–P–71, IS GRANTED; and the opposition of Buckeye Communications Co. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[7] 326 U.S. 372 (1945).

F.C.C. 72R-276

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of SUMITON BROADCASTING CO., INC., SUMITON, ALA. For Construction Permit	Docket No. 18204 File No. BP-17108

ORDER

(Adopted September 29, 1972; Released October 3, 1972)

BY THE REVIEW BOARD:

1. The Review Board having under consideration the petition requesting permission to file a brief in support of exceptions which exceeds 50 pages in length (Section 1.277(c));

2. IT APPEARING, That no objections to acceptance of the petition have been filed within the time allowed therefor;

3. IT IS ORDERED, That the petition IS GRANTED and the brief in support of exceptions IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

F.C.C. 72-885

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF THREE STATES BROADCASTING COMPANY, LICENSEE OF RADIO STATION WHJC, MATEWAN, W. VA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted October 5, 1972; Released October 12, 1972)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND REID ABSENT; COMMISSIONER WILEY DISSENTING.

1. The Commission has under consideration an application dated May 30, 1972, filed by the licensee of Radio Station WHJC, Matewan, West Virginia, for remission or mitigation of the forfeiture of two thousand dollars ($2,000) imposed in *Three States Broadcasting Company*, 35 FCC 2d 504, adopted April 26, 1972.

2. The forfeiture was assessed for repeated violations of numerous Sections of the Commission's Rules and Section 317 of the Communications Act of 1934, as amended, which were set out in detail in the previous decision.

3. In the application for remission or mitigation, the licensee by its counsel states that the purpose of its request is "to point out to the Commission that the amount of the forfeiture is far out of proportion to the violations involved." The licensee contends that the violations for which it incurred apparent liability were "relatively minor engineering infractions for which a fine of a few hundred dollars is customarily deemed appropriate," and cites cases which the licensee believes supports its contention. The licensee then states its belief that it was assessed a substantial forfeiture primarily because of its violations of the rules involving the "Record Corner" program, and that the forfeiture would have been lower had it not been for "Record Corner." The licensee states: "it is unfair to exact such a sizeable fine for an infraction in an area of rules interpretation as hazy as that involved here," claiming that the instant case is one of first impression, which, licensee asserts "includes clarifications or refinement of existing policies, c.f. letter to *KCOP-TV, Inc.*, 19 RR 2d 607 (1970)." (24 F.C.C. 2d 149). Licensee then argues that the forfeiture should be reduced since:

(1) The rule involved gives no specific notice, in that Section 73.112(2)(ii) "only requires logging of '* * * the duration of each commercial message * * * in each hour'" * * * but that "The rule itself * * * sheds no light at all on the precise question here: i.e. the logging of commercial content of religious recordings."

(2) It is unfair to fine a licensee for constructive knowledge of the *KCOP–TV* letter, since the letter did not appear in the Federal Register, nor was it "sent to all licensees, as are some documents viewed by the Commission to be of particular import." The licensee claims it had no prior knowledge of the *KCOP–TV* letter and "to subject it to a sizeable fine for constructive notice of such a document is clearly unfair."

(3) The applicability of the *KCOP–TV* letter is not that apparent in that "a layman (perhaps not even an attorney) would deduce that the *KCOP–TV* ruling applied directly to "Record Corner." The licensee complained that the exception to the commercial logging rule involving religious programs which requires programs advertising a commercial product (such as "Record Corner") to be logged as commercial in their entirety is too complicated, that "(i)t is plain that this was not a simple matter, and that even a seasoned communications attorney might have found it somewhat vague, if not confusing."

4. We have carefully considered the licensee's application and we are not persuaded that the violations for which it has incurred apparent liability are "relatively minor" such as to merit a fine of only a few hundred dollars, nor do we agree with its assumption that the severity of the forfeiture is principally due to its broadcast and improper logging of the "Record Corner" program. At WHJC, eleven separate violations of the Rules were observed, indicating a disregard for the Commission's Rules and Regulations which warrants a forfeiture of the amount ordered. The licensee has cited cases where lesser forfeitures were imposed.[1] However, in those cases, violations of three or fewer Rules were involved. The eleven separate Rules violated in this case explain the higher forfeiture and distinguish the cited cases. Where forfeitures have been imposed for numerous violations, they have been relatively large. For example, Station WLIS was fined $5,000 for violating six separate rules, FCC 70–109, January 28, 1970.[2]

5. Further, we are not persuaded by licensee's argument that the forfeiture is based primarily on the broadcast of the "Record Corner" program, and that *KCOP–TV* did not give adequate notice to licensees confronted with the problem of how to log program-length commercials. The forfeiture is based on all of the violations noted in the Notice of Apparent Liability, and even ignoring the violations involving the "Record Corner" program, a sizeable forfeiture still would be appropriate. However, we believe that *KCOP–TV* gave adequate notice regarding the logging of programs such as the "Record Corner," as we stated in our Memorandum Opinion and Order of April 26, 1972. The licensee's contention that the forfeiture should be reduced because it was unaware of the *KCOP–TV* letter is untenable since the letter was not only published as a part of the Federal Communications Commission Reports, but was the subject of a News Release by the Commission and was available to the public, including licensees and Com-

[1] The cases are: *Southeast Texas Broadcasting Co.*, 2 FCC 2d 981, 7 RR 2d 289 (1966); *XX Broadcasting Corporation*, 5 FCC 2d 20, 8 RR 2d 529 (1966); *Robert I. Kimel*, 20 FCC 2d 932, 17 RR 2d 1254 (1969); *Henryetta Radio Company*, 21 FCC 2d 825, 18 RR 2d 596; and *Caribbean Broadcasting Corporation*, 22 FCC 2d 405, 18 RR 2d 988 (1970).

[2] Examples are relatively rare, because a large number of violations often results in a revocation proceeding or the designation of a renewal application for hearing.

munications attorneys, soon after it was adopted by the Commission.[3] Further notice has been given by virtue of forfeitures assessed in light of the *KCOP–TV* decision. See, for example, *Dena Pictures, Inc.* (*KXL*), 26 FCC 2d 987 (1970), remission denied, 31 FCC 2d 206 (1971). Other rulings on the topic have appeared in response to requests for declaratory rulings, *National Broadcasting Company, Inc.*, 29 FCC 2d 67 (1971). Finally, a requirement of actual notice would be contrary to the basic policy behind forfeiture proceedings; that is, to encourage knowledge, not ignorance, of the requirements imposed on licensees by our Rules or by the terms of their licenses. As we stated in *Crowell-Collier Broadcasting Corp.*, FCC 61–981, 21 RR 921 (1961):

> We intend to use the forfeiture proceeding, as we believe it was intended to be used, to impel broadcast licensees to become familiar with the terms of their licenses and the applicable Rules, and to adopt procedures, including periodic review of operations, which will insure that stations will be operated in substantial compliance with their licenses and the Commission's Rules. (21 RR at 927)

In view of that policy, we have rejected requests for mitigation or remission of forfeitures for violations of rules allegedly caused by inadvertence, oversight, mistake, or mistaken interpretation of the Rules. See, for example, *Hanson R. Carter*, 23 FCC 2d 511 (1970). Hence, we reject the licensee's claim here that the forfeiture should be mitigated because it alleges a lack of actual notice of an interpretation of a rule, especially since public notices of similar interpretations of the Rule in question have been given on several occasions.

6. Finally, we reject the licensee's contention that the applicability of the *KCOP–TV* ruling to the present situation is not clear because the "Record Corner" program plays religious music. The logging of sponsored religious programs has been accorded separate consideration, see paragraph 6 of *Program Log Rules*, 11 FCC 2d 992 (1968). However, as we pointed out in *Program Log Rules*, the logging of commercial products on religious programs is not to be treated differently from the logging of any other commercial announcement. In this case, the licensee played selections from a record followed by announcements promoting the sale of the same record. In our view, the *KCOP–TV* ruling is clearly applicable. Therefore, considering all the circumstances of this case, we are not pursuaded to remit or mitigate the forfeiture.

7. Accordingly, *IT IS ORDERED*, that the application for remission or mitigation of the forfeiture of Three States Broadcasting Company IS DENIED.

8. IT IS FURTHER ORDERED, that the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Three States Broadcasting Company, licensee of Radio Station WHJC, Matewan, West Virginia.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[3] FCC News, Report No. 9176, July 7, 1970.

F.C.C. 72-914

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of UNIVERSITY OF MINNESOTA, MINNEAPOLIS, MINN. For Construction Permit for New FM Broadcast Station to Operate on Channel 219 (91.7 MHz)	)

MEMORANDUM OPINION AND ORDER

(Adopted October 12, 1972; Released October 17, 1972)

BY THE COMMISSION:

1. The Commission has before it for consideration an application, tendered for filing August 3, 1970, by the University of Minnesota (UM), requesting a construction permit for a new noncommercial educational FM radio broadcast station to operate on channel 219 (91.7 MHz), Minneapolis, Minnesota, with effective radiated power of 97.7 kW and an antenna height above average terrain of 615 feet, to be top-mounted on the tower formerly used by television station KTCA-TV. Operating as proposed, the transmitter site would be 62.3 miles from the transmitter of station WDMW(FM), channel 221 (92.1 MHz), Menomonie, Wisconsin. Section 73.207(a) of the Commission's rules requires, in this case, a minimum mileage separation of 65 miles between second adjacent channel FM stations and the proposed site would, therefore, be short-spaced 2.7 miles. The applicant has requested a waiver of the rules.[1] The applicant states that it made an extensive study to find a channel which could be utilized in the area for a new noncommercial educational FM station, but that no channels were available which could be used consistent with the technical requirements of the Commission's rules. The study, however, revealed that channel 219 (91.7 MHz) could be used if station KSJN-FM, New Brighton, Minnesota, were to operate on channel 215 (90.9 MHz) instead of on channel 216 (91.1 MHz) as now authorized. The applicant, therefore, filed simultaneously with its application a "Request for Order to Show Cause", asking that Minnesota Educational Radio, Inc. (MER), licensee of FM stations KSJN-FM, channel 216, New Brighton, Minnesota, and KSJR-FM, channel 211 (90.1 MHz), Collegeville, Minnesota, be required to show cause why the license of station KSJN-FM should not be modified to specify operation on channel 215 (90.9 MHz). The applicant states that negotiations have been in progress sporadically with MER and its predecessor since

[1] Because the application is inconsistent with the rules, it has not been accepted for filing.

1967 in an effort to induce a change of channel for station KSJN–FM voluntarily, with UM paying the costs. MER has steadfastly resisted these efforts and this controversy arises principally out of this set of facts.[2]

2. MER's programming is distributed mainly to rural areas in Minnesota by a system consisting of off-the-air relay to station KSJN–FM by commonly owned and operated station KSJR–FM in Collegeville, 67 miles northwest of New Brighton (a northern suburb of Minneapolis-St. Paul). Station KSJN–FM operates with a Subsidiary Communications Authorization (SCA), providing a multiplexed subchannel signal for the use of the Minnesota State Services for the Blind (SSB). This signal is utilized by SSB to serve approximately 1,400 fix-tuned receivers in homes of the blind and the service is known as the "Radio Talking Book." Each receiver is specially designed for reception of only this signal. MER states that its programs for the blind are also carried by cable television systems, which it has not identified. Since station KSJN–FM operates on 91.1 MHz and receives a stereo composite signal from KSJR–FM on incoming frequency 90.1 MHz, the received and transmitted signals are just 1 MHz apart. The result of this situation, according to MER, has been constant and severe technical difficulties. Operation of station KSJN–FM on 90.9 MHz would involve a separation of only 0.8 MHz, severely aggravating the technical difficulties and, MER avers, any further refinement of the receiving equipment would render the SCA sub-channel signal unusable. Moreover, MER says, the net working arrangement under which both stations[3] contribute programming enables MER to operate two stations at a programming cost equivalent to that of one station. MER states that, as a noncommercial educational organization with limited resources, it does not have the financial wherewithal to defray the expenses of the changes in its system which would be required. UM has, of course, offered to defray those expenses, but the amount is in dispute and varies widely. MER, for example, contends that if its off-the-air relay system is rendered inoperable, it would be compelled to construct an intercity microwave relay system at a cost of over $107,000. UM dismisses this figure as unrealistic, basically because it takes the position that the off-the-air relay system need not be abandoned.

3. The other major factor involved in this proceeding is the fate of the SCA service to SSB. The file contains numerous exchanges of

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[2] The following pleadings have been filed in this proceeding, subsequent to the request for a show-cause order: Opposition to request for show-cause order, filed November 9, 1970, by MER; Opposition to request for waiver, filed December 31, 1970, by Evelyn Whitford and Wendell Hansen, d/b as Menomonie Broadcasting Company, licensee of station WDMW(FM), channel 221 (92.1 MHz), Menomonie, Wisconsin; Reply, filed January 15, 1971, by UM; Supplement to Reply, filed January 21, 1971, by UM; Request for Leave to File Response to Reply, filed January 26, 1971, by MER; Petition for Leave to File Financial Data, filed February 18, 1971, by Menomonie Broadcasting; Comments on Menomonie petition, filed March 10, 1971, by UM; Response to UM Reply, filed March 17, 1971, by MER; Reply to MER's response, filed April 16, 1972, by UM; and comments, filed May 6, 1971, by MER.

[3] MER is also the permittee of FM radio station KCCM–FM, channel 216 (91.1 MHz), Fargo-Moorhead, Minnesota. That station is not directly involved in this matter except to the extent that it constitutes an element of MER's "network".

correspondence between the antagonists and SSB, UM reassuring MER and SSB that the "Talking Book Service" is not doomed and the latter expressing its grave doubts on that score. SSB, for example, states that, in order to preserve the "Talking Book Service," each of the 1,400 fix-tuned receivers must be collected and sent *en masse* back to the manufacturer for retuning at a cost of approximately $63,000 and interruption of the service for a period of up to eight weeks. All of this can be avoided, MER contends, if UM would acquire one of the existing FM radio stations in Minneapolis, adding that negotiations in this matter have been going on since 1967, but one of the existing FM stations in Minneapolis acquired its construction permit in 1969—a facility which UM might have obtained had it really made the effort. This, of course, is categorically denied by UM. UM alleges that MER could retain its existing off-the-air relay system if the receiving site of station KSJN–FM were relocated. Insofar as retuning of the "Talking Book Service" receivers is concerned, UM states that the job could be done for no more than $12,000. If, UM states, the receivers were not returned to the manufacturer but were serviced in the field by trained students, the job could be done inexpensively and with an interruption of no more than three weeks. Each receiver, UM says, can be retuned in 15 minutes.

4. We need not discuss all of the details of the divergent claims in the pleadings on the feasibility and costs of retuning. The exchange seems to have been terminated by a letter from the manufacturer in which the company states that retuning can be accomplished in the field only with elaborate laboratory equipment operated by skilled and trained technicians; that it takes the manufacturer about 6 weeks to train such a technician and that more than one-half hour (basic warm-up time) is required in connection with each receiver; that if anyone other than the manufacturer's technicians makes the adjustments, the manufacturer may consider that action sufficient to void its warranty on each receiver.

5. MER and SSB continue to express their grave reservations as to the feasibility of operation of station KSJN–FM as recommended by UM and each is equally concerned with the future of the "Talking Book Service." UM's reassurances have not succeeded in persuading them otherwise. We begin our consideration of the various contentions by acknowledging that UM, which operates standard radio station KUOM (770 KHz), Minneapolis, on a share-time basis with station WCAL(AM), Northfield, Minnesota, would provide a valuable noncommercial educational FM radio service to a large segment of the public in and around Minneapolis. We also recognize that UM has a statutory obligation under the laws of Minnesota, as a state university, to provide the proposed service to as much of Minnesota as possible. It is prepared, within limits, to defray the expenses of the changes it proposes. We are of the opinion, however, that UM has failed to sustain its burden of showing that a grant of its application would serve the public interest, convenience, and necessity. It has not established that MER's operations can be continued without substantial adverse effect on the public, particularly the blind who receive the "Talking Book

Service." Clearly, there has been no showing that the service which the proposed new station would offer would replace the existing services of MER. While we believe that the proposal for a new noncommercial educational FM radio service is meritorious, we think that the price would be too high if MER's service were adversely affected. In coming to this conclusion, we note that Minneapolis is not without a multiplicity of FM radio services. In summary, we find that UM has not made a convincing showing sufficient to support its request for a show-cause order.

6. The mileage separation shortage with station WDMW(FM) presents less of a problem, but it also stands as a bar to grant of the application. Menomonie Broadcasting insists that UM could locate its antenna west or northwest of the proposed site and meet all mileage separation requirements. UM states that it does not have the financial resources to search for and establish such a site when an existing site is available.[4] UM contends that " * * * the possibility of interference from the proposed operation is much less than would result from operation allowable under the present rules * * *." UM offers "equivalent protection" to WDMW(FM) and attempts to distinguish cases cited by Menomonie where short-spaced FM proposals have been refused, saying that, in those cases, the reasons for short-spacing were solely economic. UM's reasons, however, are economic. The University frankly admits that: "While the University asks that the mileage separation requirements be waived for economic reasons, it is relying heavily upon the fact that its proposal provides equivalent protection to station WDMW(FM)." Equivalent protection, where short-spacing of FM stations is involved:

> * * * is not a relevant consideration under the Commission's rules which now provide for minimum spacings between stations to allow for future expansion and no longer provide for the determination of protected contours.

Mission East Co. (*WIGL*), 25 FCC 2d 428, 10 RR 2d 213. We find, therefore, that neither UM's proposal for equivalent protection nor its reasons for failure to meet the mileage separation requirements warrants a waiver of our rules.

7. An order to show cause is an extraordinary remedy and lies within the Commission's discretion. The burden required to support issuance of such an order is a heavy one and UM has failed to sustain that burden. For the reasons stated, we are unable to find that there is good reason to issue a show cause order to MER. The application is, therefore, inconsistent with section 1.573, Note (a)(2)(iii). The applicant has not requested a waiver of this rule. Moreover, the applicant has failed to set forth reasons sufficient, if true, to warrant a waiver of section 73.207(a) or the rules, and a hearing on this waiver request is not required. *United States* v. *Storer Broadcasting Company*, 351 U.S. 192, 76 S.Ct. 763, 13 RR 2161. The application is not acceptable for filing and will be returned to the applicant.

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[4] We find some inconsistency in UM's plea that it lacks the economic resources to locate a site which will meet all spacing requirements with its apparent ability and readiness to pay all the costs of changes required in KSJN–FM's broadcasting facilities.

Accordingly, IT IS ORDERED, that the University of Minnesota's request for an Order to Show Cause, to be directed to Minnesota Educational Radio, Inc., IS DENIED; the request of University of Minnesota for waiver of section 73.207(a) of the Commission's rules IS DENIED, and the above described application IS RETURNED, as unacceptable for filing, pursuant to section 1.566(a) of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-875

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re The Matter of an Application for Certificate of Compliance filed by VIKING MEDIA CORP., MONONA, WIS.	CAC-237 WI060

MEMORANDUM OPINION AND ORDER

(Adopted October 5, 1972; Released October 13, 1972)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND REID ABSENT.

1. The Viking Media Corporation operates a cable television system at Monona, Wisconsin, a community located in the Madison, Wisconsin television market, the 93rd largest.[1] Since December 1971, the system has provided its few subscribers[2] with the following local television signals:

WISC-TV (CBS, Channel 3), Madison, Wisconsin.
WMTV (NBC, Channel 15), Madison, Wisconsin.
WKOW-TV (ABC, Channel 27), Madison, Wisconsin.
WHA-TV (Educ., Channel 21), Madison, Wisconsin.

On April 25, 1972, Viking Media filed—and subsequently amended—an application for a certificate of compliance pursuant to the rules and procedures adopted in the *Cable Television Report and Order*, FCC 72-108, 37 Fed. Reg. 3252, requesting certification of its proposal to add these signals:

WVTV (Ind., Channel 18), Milwaukee, Wisconsin.
WMVT (Educ., Channel 36), Milwaukee, Wisconsin.
WGN-TV (Ind., Channel 9), Chicago, Illinois.

The system has 19 channels available for non-broadcast access use, prompting the applicant to state that it intended "to stress the potential of non-broadcast services and to encourage access and lease use."

2. Apart from the *pro forma* objections filed by professional sports, this application is opposed by Forward Television, Inc., the licensee of Station WMTV, Madison, Wisconsin. Forward Television argues that certification of the application should be denied or delayed on two grounds: that (1) the *Midwest Video* decision,[3] then pending before the Supreme Court, might well serve to invalidate much of the Commission's regulatory program for cable television if the decision was sustained; and (2) Viking Media's statement concerning its plans to utilize its access channels was "*prima facie* insufficient" with the requirements of §§ 76.13(c) and 76.251. In particular, Forward Tele-

[1] In 1970, Monona's population was 10,420.
[2] Numbering 82 by its last count.
[3] *Midwest Video Corporation v. United States*, 441 F. 2d 1322 (1971).

vision noted the "sweeping conclusions" which informed the "three short paragraphs" of Viking Media's access statement. Accordingly, Forward argued that there could be no finding that a sufficient program for the use of these access channels had been proposed.

3. Viking Media has made predictably short work of the first argument, citing the Supreme Court's decision in *United States et al. v. Midwest Video Corporation*, —— U.S. —— (Case No. 71–506), which reversed the ruling of a federal court of appeals. In reply to the second argument, Viking Media denied that its original access statement was inadequate, but the statement was substantially supplemented nonetheless. As a consequence, Viking Media's access program consists of the following:

(a) With 27 channels available, there exists sufficient capacity to implement a comprehensive access program;

(b) For each Class I cable channel utilized, the system will have an additional channel available, 6 MHz in width, for the transmission of Class II and Class III signals;

(c) The system will maintain a "technical plant" with 2-way capacity;

(d) One specifically designated "Public Access" channel will be maintained, with equipment and facilities available for its use;

(e) One specifically designated educational access channel will be utilized;

(f) One specifically designated channel for Local Government use will be available;

(g) Channels will be available on a leased basis, subject to the Commission's rules concerning use and displacement;

(h) When the access channels are used to the degree contemplated by the rules, capacity for non-broadcast access will be expanded;

(i) No program content control will be exercised over these channels, but operating rules for their use will be established;

(j) The educational and local government channels will be made available, without cost, for five years following completion of the basic trunk line of the system and commencement of service.

(k) A full-time "Director of Local Programming" has been employed to develop the use of these channels in Monona.

4. Our rules are designed to permit the prompt certification of all applications determined to be consistent with their provisions. It is undisputed that the addition of the new signals proposed for carriage on the Monona system is consistent with the provisions of § 76.63(a) of the Rules. Consequently, the only inquiry we must undertake is into the adequacy of Viking Media's statement regarding access to its non-broadcast channels. Clearly, there is a wealth of channel capacity available to satisfy the demands of our rules, and when the amended access statement is compared with the requirements of § 76.251, it is apparent that a satisfactory program has been proposed. As we stated in another context, "to the extent possible * * * within the technical and geographic parameters of the systems involved, we intend to safeguard the integrity of our access requirements. This can best be done if, during the certificating process, we are provided with sufficient

detailed information concerning the system's ability to comply."[4] Viking Media's exhaustive treatment of its access program adheres to this standard.

Accordingly, IT IS ORDERED, That the captioned application for certificate of compliance filed by Viking Media Corporation IS GRANTED.

IT IS FURTHER ORDERED, That the "Objections to Application", filed by Forward Television, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[4] *Reconsideration of the Cable Television Report and Order,* FCC 72–530, 37 Fed. Reg. 13848, Paragraph 90. There we discussed the problems of providing access to subscribers served by several systems and a single headend.

F.C.C. 72R-278

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of VOICE OF DIXIE, INC., BIRMINGHAM, ALA. FIRST SECURITY AND EXCHANGE CO., BIRMINGHAM, ALA. For Construction Permits	Docket No. 18664 File No. BPH-6449 Docket No. 18666 File No. BPH-6610

ORDER

(Adopted September 29, 1972; Released October 3, 1972)

BY THE REVIEW BOARD:

1. The Review Board having under consideration petition for leave to amend and to update application pursuant to Section 1.65 of the Rules, filed on October 20, 1971, by Voice of Dixie, Inc.;

2. IT APPEARING, That no objections to acceptance of the amendment has been filed within the time allowed therefor;

3. IT IS ORDERED, That the petition for leave to amend IS GRANTED and the amendment therein IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*